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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

UNITED HOME RENTALS, INC., ET AL.,

Petitioners,

v.

TEXAS REAL ESTATE COMMISSION, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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February 13, 1984

QUESTIONS PRESENTED FOR REVIEW

1. Whether, in a civil rights action, the federal courts may abstain under *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496 (1941), without identifying an important state interest to be served by dismissal of the action?

2. Whether a federal court of appeals may use a de novo standard of review to disregard the views of the district court regarding abstention and to order the district court to abstain?

PARTIES TO THE PROCEEDINGS

The Petitioners are United Home Rentals, Inc., Michael A. Livingston and W. Eugene Bushman. The Respondents are the Texas Real Estate Commission and the State of Texas.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United Home Rentals, Inc., et al., petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 716 F.2d 324. The opinion is reprinted as Appendix A to this petition. The opinion of the district court is reported at 548 F.Supp. 566. It is reprinted as Appendix B to this petition.

JURISDICTION

The court of appeals entered judgment on October 3, 1983, A. 42, and denied a petition for rehearing and rehearing en banc on October 31, 1983, A. 43-44. On January 20, 1984, Justice White extended the time for filing a petition for a writ of certiorari to and including February 14, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THIS CASE

The First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983 (Supp. IV 1980) are not reprinted here. The pertinent portions of Texas' Real Estate License Act and the Texas Real Estate Commission regulations adopted pursuant thereto are reprinted in Appendix E to this petition.

STATEMENT OF THE CASE

Petitioners, a rental information service, its president, and a former employee,[1] filed this civil rights action in 1981 against the State of Texas and the Texas Real Estate Commission (the "Commission") to prevent them from interfering with petitioners' right to collect and publish information. The district court, after deciding not to abstain and proceeding to the merits, held that the Commission was violating petitioners' First Amendment rights by requiring licenses for protected activity. Nearly three years after the action was filed, however, a divided panel of the Fifth Circuit held that the district court should have abstained from reaching the merits under *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496 (1941).

The facts are not in dispute. Petitioner United Home Rentals, Inc. ("United") is a subscription information service. United publishes and sells access to catalogues describing available rental housing for several Texas metropolitan areas. Although United compiles the information, it does not inspect the property or act in any way as an agent for either landlords or customers. Except for petitioner Livingston, no licensed agents or brokers are presently employed by United.

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[1] Petitioner Michael A. Livingston is licensed as a broker by the Texas Real Estate Commission and is the sole shareholder and president of United Home Rentals, Inc. Petitioner W. Eugene Bushman is a broker licensed by the Commission who was employed by United Home Rentals, Inc. but now operates a competing rental service.

Texas' Real Estate License Act, TEX. REV. CIV. STAT. ANN. art. 6573a § 2(2) (Vernon 1982) and the regulations promulgated thereunder by the Commission, define brokering activities to include the gathering, verifying, compiling and sale of information relating to available rental properties.[2] To perform "brokering" activities legally, therefore, an individual must possess a real estate license issued by the Commission. Because each employee of petitioner United compiles, verifies, and sells rental information, the Commission has insisted that each be a licensed real estate salesman or broker.

Although petitioners objected to this requirement, they nevertheless asked the Commission to give them time to get into compliance and to modify the Commission's regulation to permit non-supervisory employees to remain unlicensed. The Commission refused to alter its rules or to grant any time period in which United could get into compliance. Furthermore, it denied licensure applications by three United employees who otherwise qualified for licensure, but whose "integrity" was questioned because they performed "brokering" activities (*i.e.*, worked for United) while they were unlicensed. The Commission also began administrative action to revoke the licenses of petitioners Livingston and Bushman based solely upon their association with "unlicensed" United personnel (*i.e.*, the three employees whose licenses were denied) and also threatened criminal prosecution of petitioners and their agents.

After one unsuccessful suit,[3] petitioners filed this action on May 19, 1981, under 42 U.S.C. § 1983, challenging the statute

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[2] The statute and regulations are set forth as Appendix E to this petition. See summaries in the district court opinion, A. 36-38, and the court of appeals opinion, A. 3-7.

[3] Petitioners filed suit in April 1980, challenging the statute and regulations based upon the equal protection clause of the Fourteenth Amendment. The court found that the statute and regulations covered the activities of petitioners and their employees and upheld the regulatory scheme under the rational basis standard. The court refused to grant petitioners leave to assert First Amendment grounds for relief, and issues involving freedoms of the press and speech were expressly reserved. *United Home Rentals, Inc.* v. *Texas Real Estate Commission*, CA No. 3-80-0485-F (N.D. Tex. Dallas Apr. 15, 1981) described at A. 7, 9, 13.

and regulations based upon First Amendment guarantees of commercial free speech and freedom of the press. Eight months after trial, the trial court requested briefing from the parties as to whether or not the holding in *Gibson* v. *Berryhill*, 411 U.S. 564 (1973), required abstention. All parties then filed a joint motion requesting the court to rule on the merits. The State expressly waived application of the doctrines of abstention and exhaustion of administrative remedies, and stipulated that agency action was "final." A. 29, 31.

Noting that neither petitioners nor the State saw any purpose to be served by abstention, the trial court decided to address the merits. A. 31. The court then held that the statutes and regulations at issue violated petitioners' First Amendment rights. The court pointed out that petitioners "offer only an exchange of information for a set fee. They or their employees do not counsel either landlords or tenants. They do not show properties. They get involved in neither lease negotiations nor contract legalities." A. 40. Concluding that petitioners "offer the same service that newspapers do, an exchange of information," *id.*, the court determined that Texas could not require a license to compile and publish the information.

On appeal, the parties briefed and argued only the merits. After submission, the court of appeals, on its own motion, decided the district court should have abstained and ordered dismissal. Stating that "[o]ur review of the district court's refusal to abstain is predicated on a de novo standard," A. 17 n. 19, the court of appeals gave no weight to the waiver by the State or the decision by the district court to exercise jurisdiction.[4] The court instead announced:

> *Pullman* mandates that a federal court faced with an initial review of a state agency's application of its own regulations, where that application is challenged on constitutional grounds, should abstain, absent com-

[4] The court of appeals, also on its own motion, raised the issues whether principles of res judicata and collateral estoppel barred the suit and held they did not. A. 8-14.

> pelling circumstances, in order to allow the state agency and the state courts first review of the interpretation of state law at issue and to avoid unnecessary constitutional adjudication.

A. 21.

Applying this rule, the court of appeals found abstention appropriate for two reasons. First, contrary to the views of both petitioners and the State, the court suggested possible readings of state law that might eliminate the need for some but not all employees of United to be licensed. A. 18-19. Second, it indicated that the delay caused by abstention might renew "a process of negotiation and compromise as to the scope of the licensing requirement." A. 20-21 & n.29. The court noted that judicial intervention "would indicate to other parties engaged in similar discussions with state agencies—and to the agencies themselves—that the federal courts will provide a ready solution to local disputes over state regulations." A. 20.

Judge Tate dissented, saying that "[a]pplication here of the *Pullman* principle, expressly eschewed by the appellant State, serves only to delay and fragment decision of the central issue squarely raised by this litigation . . . ." A. 22. Judge Tate noted that the State had left no doubt about its position "that [the State] is entitled to exact licenses from employees before permitting them to exercise the free speech rights here at issue, under the unambiguous terms of the statute as authoritatively construed and consistently applied by the Texas agency entrusted with its administration." *Id.* He agreed with the district court that such requirements "infringe[d] on the [petitioners'] first amendment rights." A. 21.

REASONS FOR GRANTING THE WRIT

The decision below, holding that a federal court was required to abstain in a civil rights case raising non-frivolous First Amendment claims, inverts the principles of federalism on which the abstention doctrine stands. Contrary to the practice in at least five other circuits, the Fifth Circuit ordered abstention without making any inquiry into whether resort to state courts would serve an important state interest. *Compare* A. 15-21 *with C-Y Development Co.* v. *City of Redlands*, 703 F.2d 375, 377 (9th Cir. 1983); *D'Iorio* v. *County of Delaware*, 592 F.2d 681, 686, 691 (3d Cir. 1978); *Vinyard* v. *King*, 655 F.2d 1016 (10th Cir. 1981); *Record Revolution No. 6, Inc.* v. *City of Parma*, 638 F.2d 916, 926 (6th Cir. 1980), *vacated*, 456 U.S. 968 (1982), *rev'd on other grounds*, 709 F.2d 534 (6th Cir. 1983); *George* v. *Parratt*, 602 F.2d 818, 822 (8th Cir. 1979). This omission is particularly significant in light of the fact that the Commission sought to waive any claim for abstention, a factor given no weight whatsoever by the court of appeals. The result is a significant intrusion on First Amendment rights without any compensating benefit to state sovereignty.

The court of appeals also applied the wrong standard of review on appeal. Although this Court and most other courts of appeals appear to review decisions regarding abstention under an abuse of discretion standard, *e.g.*, *Pue* v. *Sillas*, 632 F.2d 74, 78 (9th Cir. 1980); *Ramos* v. *Lamm*, 639 F.2d 559, 564 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); *Luecke* v. *Mercantile Bank*, 720 F.2d 15, 18 (8th Cir. 1983); *City Investing Co.* v. *Simcox*, 633 F.2d 56, 64 (7th Cir. 1980), or a variation thereof, *D'Iorio* v. *County of Delaware*, 592 F.2d at 686, the Fifth Circuit conducted a complete de novo review. This disregard of the findings of the district court not only unsettles the relationship between trial and appellate courts but leads to needlessly harsh consequences.

1.

A FEDERAL COURT MAY NOT ABSTAIN UNDER *PULLMAN* IN A CIVIL RIGHTS ACTION WITHOUT IDENTIFYING AN IMPORTANT STATE INTEREST TO BE SERVED BY DISMISSAL.

It is by now well-recognized that "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule." *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800, 814 (1976) (dictum) (quoting *County of Allegheny* v. *Frank Mashuda Co.*, 360 U.S. 185, 188-89 (1959)). As a general matter, the federal courts should be highly reluctant to decline or even postpone jurisdiction expressly conferred upon them by Congress. *See, e.g., Patsy* v. *Board of Regents*, 457 U.S. 496 (1982). Moreover, "abstention operates to require piecemeal adjudication in many courts, . . . thereby delaying ultimate adjudication on the merits for an undue length of time . . . ." *Baggett* v. *Bullitt*, 377 U.S. 360, 378-79 (1964). Thus, "[a]bdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the state court *would clearly serve an important countervailing interest*," *Colorado River Water Conservation District*, 424 U.S. at 813 (quoting *County of Allegheny* v. *Frank Mashuda Co.*, 360 U.S. 185, 188-89 (1959)) (emphasis added), *quoted with approval in Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 103 S. Ct. 927, 936 (1983).

The Second Circuit has noted that the obligation to decide cases "has been repeatedly recognized as carrying special force in civil rights actions under §1983," basing that view on the "duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims . . . ." *McRedmond* v. *Wilson*, 533 F.2d 757, 760 (2d Cir. 1976) (quoting *Zwickler*

v. *Koota*, 389 U.S. 241, 248 (1967)). Because of this mandate, "federal courts have generally regarded vital questions of civil rights as the least likely candidates for abstention . . . ." *George* v. *Parratt*, 602 F.2d 818, 819-20 (8th Cir. 1979); *see also Manney* v. *Cabell*, 654 F.2d 1280, 1284 (9th Cir. 1980), *cert. denied*, 455 U.S. 1000 (1982) ("We bear in mind that the federal courts are particularly hesitant to abstain in section 1983 cases."). By the same token, this Court has cautioned against casual use of abstention where rights to free speech or other fundamental rights are at risk. *See Baggett* v. *Bullitt*, 377 U.S. at 378-79; *Babbitt* v. *United Farm Workers National Union*, 442 U.S. 289 (1979); *Procunier* v. *Martinez*, 416 U.S. 396 (1974); *Harman* v. *Forssenius*, 380 U.S. 528, 537 (1965). The Eleventh Circuit has thus recently noted: "Abstention is to be invoked particularly sparingly in actions involving alleged deprivations of First Amendment rights . . . and other constitutional rights deemed fundamental . . . even though the state law issue has not been resolved by the state supreme court." *Cate* v. *Oldham*, 707 F.2d 1176, 1184 (11th Cir. 1983).

The threat to First Amendment rights in this case is not merely theoretical. Although the Commission, acting pursuant to statute and its own regulations, has demanded that employees of petitioner United seek licenses to acquire and convey rental information, the district court held that this demand was invalid under the First and Fourteenth Amendments. The court found that, despite respondents' claims to the contrary, petitioners "offer the same service that newspapers do, an exchange of information." A. 40, 32. Comparing petitioners to "a newspaper that solicits classified advertisements listing homes for lease or sale," *id.*, the court found that the Commission had no legitimate basis in regulating that protected activity. A. 40-41.[5]

[5] Although the speech at issue here plainly has a commercial purpose, that fact does not extinguish First Amendment protection. *See*, e.g., *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980). For example, the State could hardly demand that a newspaper obtain a license in order to publish classified or other advertising.

Notwithstanding these findings, the Fifth Circuit held that petitioners' suit should have been dismissed on the basis of *Pullman*. A. 15-21. In so doing, the court gave no heed to the nature of the claim or the rights at issue. Nor did the court make any effort to identify a state interest that would be advanced by use of abstention. The court simply announced a general rule, purportedly based on *Pullman*, that

> [a] federal court faced with an initial review of a state agency's application of its own regulations, where that application is challenged on constitutional grounds, should abstain, absent compelling circumstances, in order to allow the state agency and the state courts first review of the interpretation of state law at issue and to avoid unnecessary constitutional adjudication.

A.21.

There are several distinct, though related, problems with this rule. To begin with, given the court's suggestion that the state *agency* might reverse itself,[6] the rule smacks strongly of a requirement that administrative remedies be exhausted. That inference is reinforced by the unattractive and inappropriate suggestion that the delay caused by abstention could revive the "process of negotiation and compromise as to the scope of the licensing requirement." A. 19-20 & nn. 28-29.[7] This Court, however, has recently adhered to the principle that plaintiffs need not exhaust administrative remedies in civil rights actions and rejected the Fifth Circuit's attempt to require exhaustion. *Patsy* v. *Board of Regents*, 457 U.S. 496.

The second problem with the Fifth Circuit's rule is that it disregards a central, if not the central, purpose of the *Pullman* doctrine. For, while it is true that the doctrine allows federal

[6] The parties had stipulated that the administrative proceedings were "final." A. 29, 31.

[7] It is possible, of course, that the effect of multiple suits and extended delay will be to cause plaintiffs to compromise or abandon their rights, as the Fifth Circuit apparently contemplated. But, whatever may be the merit of this result when it is the consequence of adherence to principles of comity, it is wholly out of place when no corresponding state interest is served. In the latter case, plaintiffs have been forced to surrender rights so that the federal courts do not have to consider them.

courts to avoid constitutional decisions, such an end in itself should not justify abstention in the absence of an important state interest to be served. *See Colorado River Water Conservation District,* 424 U.S. at 813. Principles of federalism do not require federal courts to turn away from constitutional questions except where, as the Court in *Pullman* observed, the case "touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open," 312 U.S. at 498. It is in those areas that deference to state sovereignty is uniquely appropriate.

The correct test for abstention, therefore, involves not just the identification of a state law issue, but also a scrutiny of the state interest to be affected. "Since the judicially created doctrine of abstention involves duplication of effort and expense and an attendant delay . . . , this Court has emphasized that it would be applied only 'where the issue of state law is uncertain' . . . *and* 'only in narrowly limited "special circumstances" ' . . . ." *Lindsey* v. *Normet,* 405 U.S. 56, 62 n.5 (1972) (emphasis added). Indeed, the Court in other abstention contexts has specifically cited the need for "important state interests," *see Middlesex County Ethics Committee* v. *Garden State Bar Association,* 457 U.S. 423, 432 (1982) (applying *Younger* v. *Harris,* 401 U.S. 37 (1971) to civil context), or a "matter of substantial public concern," *Colorado River Water Conservation District,* 424 U.S. at 814 (discussing abstention under *Burford* v. *Sun Oil Co.,* 319 U.S. 315 (1943)). In the absence of such interests, the resort to *Pullman* abstention amounts to little more than a policy of convenience for the federal courts and the automatic avoidance of constitutional challenges to state law.

The inattention of the Fifth Circuit to these principles puts it in direct or indirect conflict with at least five other courts of appeals. The Ninth Circuit, for example, uses a three-part test to determine whether *Pullman* abstention is proper:

(1) The complaint touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open.

(2) Such constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy.

(3) The possibly determinative issue of state law is doubtful.

C-Y Development Co. v. *City of Redlands*, 703 F.2d at 377 (quoting *Canton* v. *Spokane School District No. 81*, 498 F.2d 840, 845 (9th Cir. 1974)); *see also, e.g., Manney* v. *Cabell*, 654 F.2d 1280, 1283 (quoting and relying on same passage). Ordinarily, *all three* of these exceptional circumstances extracted from the *Pullman* opinion *must be present* to justify abstention. *E.g., Canton* v. *Spokane School District No. 81*, 498 F.2d at 845; *Manney* v. *Cabell*, 654 F.2d at 1283.

The Third and Tenth Circuits apply a similar three-part test. *See D'Iorio* v. *County of Delaware*, 592 F.2d 681, 686 (3rd Cir. 1978); *Vinyard* v. *King*, 655 F.2d 1016, 1018 (10th Cir. 1981). Discussing the "special circumstances generally prerequisite to the application of this doctrine," the Third Circuit has said: "it must appear that an erroneous decision of state law by the federal court would be disruptive of important state policies." *D'Iorio* v. *County of Delaware*, 592 F.2d at 686; *see also Vinyard* v. *King*, 655 F.2d at 1018. The Sixth and Eighth Circuits, while somewhat less explicit about the test to be used, require attention to "whether the federal court's decision would unduly interfere with important state policies or regulatory programs," *Record Revolution No. 6, Inc.* v. *City of Parma*, 638 F.2d 916, 925 (6th Cir. 1980), *vacated*, 456 U.S. 968 (1982), *rev'd on other grounds*, 709 F.2d 534 (6th Cir. 1983); or "whether federal intervention would interfere ... with state procedures and policies in areas of special state interest," *George* v. *Parratt*, 602 F.2d at 822.

These standards recognize that the doctrine of abstention, while grounded in a "scrupulous regard for the rightful independence of state governments," *see Fair Assessment in Real Estate Association, Inc.* v. *McNary*, 454 U.S. 100, 111 (1981), does not preempt the federal courts from tackling challenges to state law. As the Court has recently reaffirmed, "[t]he very purpose of § 1983 was to interpose the federal courts between the states and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, whether that action be executive, legislative, or judicial." *Patsy* v. *Board of Regents*, 457 U.S. at 503. The Court in *Patsy* then pointed out three recurring themes in the debates over the Civil Rights Act of 1871: First, that "Congress assigned to the federal courts a paramount role in protecting constitutional rights," 457 U.S. at 503. Second, that Congress believed "that the state authorities had been unable or unwilling to protect the constitutional rights of individuals or to punish those who violated these rights," 457 U.S. at 505. Third, that the Act "provide[d] dual and concurrent forums in the state and federal system, enabling the plaintiff to choose the forum in which to seek relief," 457 U.S. at 506. All three of these factors, which weighed against a requirement of exhaustion of administrative remedies, also weigh against use of abstention in the absence of a strong state interest to be respected in the particular case.

At the very least, the standards throughout the federal courts should be uniform. From the evidence of the cases cited above, it is apparent that, had petitioners been fortunate enough to conduct business in the Ninth Circuit or the Third Circuit or the Tenth Circuit, their First Amendment rights would have received full federal protection. The award of state real estate licenses, while concededly a proper area for state regulation, is not an area of unusual sensitivity where the federal courts must fear to tread. Indeed, the State has never urged that the federal courts should abstain in this case to

protect state programs. To the contrary, the State expressly waived its right to assert abstention. A. 31.

The Fifth Circuit's treatment of that waiver, amounting to a rejection out-of-hand, A. 17, only emphasizes the problems with its mechanical use of abstention. It is well-established that states may waive doctrines of abstention and exhaustion adopted for their benefit. This Court specifically recognized that fact in *Ohio Bureau of Employment Services* v. *Hodory,* 431 U.S. 471 (1977), by saying: "If the State voluntarily chooses to submit to a federal forum, principles of comity do not demand that the federal court force the case back into the State's own system." *Id.* at 480.

There is no reason for a different rule in *Pullman* cases. This Court in *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.,* 377 U.S. 324 (1964), in fact, agreed that abstention was unwarranted "where neither party requested it and where the litigation had been long delayed . . . ," *id.* at 329. Noting that "[t]he doctrine of abstention is equitable in its origins," the Court observed that "even though constitutional issues be involved, 'reference to state courts for construction of a statute should not automatically be made.'" *Id.* at 328-29 (quoting *NAACP* v. *Bennett,* 360 U.S. 471 (1959)).

Here, both petitioners and the State have taken the position that the Texas statute and regulations unambiguously apply to the activities at issue.[8] If they are correct, then the decision of the court of appeals will lead to nothing more than a tedious exhaustion of administrative and judicial remedies, at

[8] The views of the parties are reinforced by prior rulings by the state attorney general, Op. Att'y Gen. of Tex. H1271 (1978), and by two unreported district court opinions, *Dori Enterprises, Inc.* v. *Texas,* CA No. H-80-291 (S.D. Tex.-Houston, June 4, 1980); *United Home Rentals, Inc.* v. *Texas Real Estate Commission,* CA No. 3-80-0485-F (N.D. Tex.-Dallas Apr. 15, 1981). In any event, even the readings suggested by the court of appeals would not settle the constitutional question since they depend on the premise that licenses can be required for some, if not all, employees, A. 18, a position that petitioners dispute and that was rejected by the district court on the constitutional merits.

considerable expense to both sides, and a belated federal review of an issue that both sides believe to be ripe for immediate decision and that, in fact, has already been decided by the district court. In the meantime, petitioners' rights remain at risk without any protection from the federal courts where they have been litigating for nearly three years.[9] Before imposing such an onerous burden on petitioners and the State, the court of appeals at least should have inquired whether a federal decision would disrupt state policies or programs in any significant way. That inquiry was totally lacking here. [10]

These issues are of more than academic importance. If abstention is to be available without regard to the need to protect state interests, then the role of the federal courts in enforcing federal rights will be diminished without any benefit to state sovereignty. That serious a change should be announced, if at all, only by this Court.

2.

A FEDERAL COURT OF APPEALS, AFTER A TRIAL AND DECISION ON THE MERITS, MAY NOT EMPLOY A DE NOVO STANDARD OF REVIEW TO REVERSE THE TRIAL JUDGE'S DECISION NOT TO ABSTAIN.

The court of appeals, in overturning the decision of the district court, also announced that "[its] review of the district court's refusal to abstain is predicated on a de novo standard."

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[9] The problem is made worse in cases involving Texas law because the federal courts must dismiss the case outright, a circumstance that presumably eliminates the possibility of interim federal court relief. *See Harris County Commissioners Court* v. *Moore*, 420 U.S. 77, 88 (1975).

[10] Arguably, the Fifth Circuit's analysis treats the *Pullman* doctrine as the general rule rather than as the exception, as its formulation tends automatically to raise an initial presumption favoring abstention and thus too easily requires the plaintiff to show "compelling circumstances" in order to rebut abstention and to justify the exercise of jurisdiction. The Fifth Circuit's imposition of this burden on the plaintiff underscores the importance of defining the essential preconditions that should be established before the federal courts resort to *Pullman* abstention.

A. 17 n.19 (citing *O'Hair* v. *White*, 675 F.2d 680 (5th Cir. 1982). This standard, too has several defects. First, it alters the traditional relationship between trial and appellate courts in matters of this kind. Second, it takes no account of the unusual delay and the denial of interim relief caused by abstention dismissal once a district court has ruled on the merits.

The doctrine of abstention originally evolved out of the discretion of the equity chancellor in granting or refusing the extraordinary remedy of injunction. *Railroad Commission* v. *Pullman Co.*, 312 U.S. 496, 500-01 (1941). Although it has since been held that abstention may be invoked in actions for damages, *see Fornaris* v. *Ridge Tool Co.*, 400 U.S. 41 (1970), it has generally been accepted that the standard for appellate review of a decision to abstain or not abstain is the same as that for equity generally and for injunctions specifically—"abuse of discretion." While this Court has not directly discussed the standard, the Court has applied the abuse of discretion standard in numerous cases. *See e.g., Gibson* v. *Berryhill*, 411 U.S. 564, 580 (1973); *Harman* v. *Forssenius*, 380 U.S. 528, 534, 537 (1965); *Two Guys From Harrison-Allentown, Inc.* v. *McGinley*, 366 U.S. 582, 589 (1961). This equitable review standard implicitly incorporates the "clearly erroneous" standard for review of fact determinations by the trial judge. Fed. R. Civ. P. 52; *cf. Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 103 S. Ct. 927, 940 (1983) (reviewing by an abuse of discretion standard a district court's granting a stay under the *Colorado River* doctrine and deciding that the refusal to proceed was "plainly erroneous").

The courts of appeals have addressed the issue with varying degrees of attention and varying degrees of success. The Ninth Circuit, for example, has expressly held that, because "[t]he decision to abstain involves a discretionary exercise of a court's equity power," *Pue* v. *Sillas*, 632 F.2d 74, 78 (1980) (quoting *Baggett* v. *Bullitt*, 377 U.S. at 375), "[t]he

test we apply in reviewing district court abstention decisions is whether there has been an abuse of discretion," *id.* (quoting *Santa Fe Land Improvement Co.* v. *City of Chula Vista,* 596 F.2d 838, 839 (9th Cir. 1979); *see also Turf Paradise, Inc.* v. *Arizona Downs,* 670 F.2d 813, 819 (9th Cir. 1982), *cert. denied,* 456 U.S. 1011 (1982); *Midkiff* v. *Tom,* 702 F.2d 788, 789 n.1, 799 (9th Cir. 1983); *prob. juris noted, sub. nom., HI Housing Authority* v. *Midkiff,* 52 U.S.L.W. 3342 (Oct. 31, 1983). That standard, as explained by the Ninth Circuit, allows reversal "only when there is a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." *Pue v. Sillas,* 632 F.2d at 78. (internal quotes omitted). The Tenth Circuit has also made its views explicit: "The decision to abstain is largely committed to the discretion of the district court." *Ramos* v. *Lamm,* 639 F.2d 559, 564 & n.4 (10th Cir. 1980), *cert. denied,* 450 U.S. 1041 (1981); *accord Smith* v. *Paulk,* 705 F.2d 1279, 1282 (10th Cir. 1983).

Other circuits appear to have adopted an "abuse of discretion" standard without any particular analysis. *E.g., National City Lines, Inc.* v. *LLC Corp.,* 687 F.2d 1122, 1126 (8th Cir. 1981); *Luecke* v. *Mercantile Bank,* 720 F.2d 15, 18 (8th Cir. 1983); *City Investing Co.* v. *Simcox,* 633 F.2d 45, 64 (7th Cir. 1980); *Citizens Energy Coalition* v. *Sendak,* 594 F.2d 1158, 1162 (7th Cir. 1979), *cert. denied,* 444 U.S. 842 (1979). Still another court of appeals has tried to break the standard down into component parts, applying a de novo standard to more purely legal issues and an abuse of discretion standard to the rest. *See D'Iorio* v. *County of Delaware,* 592 F.2d 681, 686 (3rd Cir. 1978).

The Eleventh Circuit, surveying the field, has recently concluded: "No clear articulation of the standard of review emerges from this body of precedent." *Duke* v. *James,* 713 F.2d 1506, 1509 n.16 (11th Cir. 1983). However, no other circuit has gone to the extreme of adopting a de novo standard of

review across the board as to all issues in all cases. That doctrine, as this case amply demonstrates, makes the district courts nothing more than bystanders in the ultimate determination of whether they should exercise or decline the jurisdiction given them by Congress.

This Court has made clear in other contexts the importance of principles restraining the courts of appeals in their ability to substitute their judgment for that of district courts. For example, this Court has admonished that "[t]he proper observance of the division of functions between the federal trial courts and the federal appellate courts is important in every case." *Dayton Board of Education* v. *Brinkman,* 433 U.S. 406, 410 (1977). Two terms ago, the Court emphasized the importance of the "clearly erroneous" standard applicable to findings of fact, remarking that "[a]n appellate court cannot substitute its interpretation of the evidence for that of the trial court simply because the reviewing court 'might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent.'" *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.,* 456 U.S. 844, 857-58 (1982) (quoting *United States* v. *National Association of Real Estate Boards,* 339 U.S. 485, 495 (1950)).

While a decision regarding abstention obviously does not rest on matters of demeanor or credibility, other equitable factors counsel in favor of deference to the judgment of district courts, particularly where a decision not to abstain has been made and a trial on the merits has been held. First, where there is no demonstrable abuse of discretion, de novo appellate review and reversal of a decision not to abstain wastes trial court judicial resources without promoting the policies underlying the *Pullman* abstention doctrine. Second, and more important, however, are delay and the impairment of individual rights arising from it. One leading commentator on appellate review of abstention decisions has said that "declining to abstain in a case appropriate for abstention is not nearly as

serious as abstaining erroneously . . . ." Field, *The Abstention Doctrine Today,* 125 U. Pa. L. Rev. 590, 600 (1977). A reversal of the decision not to abstain is especially severe because it turns away a plaintiff who has already been forced through two levels of the federal courts, including a trial on the merits in district court. The hardship of being left without protection for federal rights in such a case is self-evident.

This case provides ample evidence of that hardship on persons who want to engage in commercial free speech. As Judge Tate noted in his dissent, Texas believes "that it is entitled to exact licenses from employees before permitting them to exercise the free speech rights here at issue, under the unambiguous terms of the statute as authoritatively construed and consistently applied by the Texas agency entrusted with its administration." A. 22. Yet, two and one-half years after filing suit to prevent such exaction and despite a trial ruling that their rights were being violated, petitioners have been remitted to state court to argue a position that does not solve the problem, appears doubtful on its face, and has been foresworn by them in their federal pleadings. That bizarre result in itself suggests that the findings of the district court deserved greater weight and respect from the court of appeals.

The standard of appellate review, as well as the elements of the *Pullman* doctrine itself, merit the attention of this Court. The balance between the rights of plaintiffs raising constitutional claims and the sovereignty of state governments is too important to be struck on a haphazard basis throughout the federal judiciary.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A

UNITED HOME RENTALS, INC.,
MICHAEL A. LIVINGSTON and
W. EUGENE BUSHMAN,
Plaintiffs-Appellees,

v.

TEXAS REAL ESTATE COMMISSION
and THE STATE OF TEXAS,
Defendants-Appellants.

No. 82-1672

United States Court of Appeals, Fifth Circuit.

Oct. 3, 1983.

The Texas Real Estate Commission and the state of Texas appealed from judgment of the United States District Court for the Northern District of Texas, William M. Taylor, Jr., J., 548 F.Supp. 566, holding that rules promulgated by the Texas Real Estate Commission pursuant to the Texas Real Estate License Act requiring licensure of employees of rental information service violated the First Amendment rights of commercial speech of the service's employees. The Court of Appeals, Gee, Circuit Judge, held that: (1) Court would not invoke res judicata or collateral estoppel for first time on appeal, and (2) District Court should have abstained from considering constitutionality of the statute's interpretation pending review of the interpretation by the state agency or Texas state courts.

Reversed and remanded.

Tate, Circuit Judge, dissented and filed opinion.

Appeal from the United States District Court for the Northern District of Texas.

Before GEE, GARZA and TATE, Circuit Judges.

GEE, Circuit Judge:

On this appeal we are asked to perform the initial review of a decision by the Texas Real Estate Commission that its rules, promulgated pursuant to the Texas Real Estate License Act,[1] require licensure of employees of a rental information service who telephone landlords to obtain rental information, or to verify the continued accuracy of rental listings, or who describe the service offered by the rental information agency to prospective subscribers. Appellees contend that this interpretation of the Act and regulations promulgated thereunder violate their rights of commercial speech guaranteed by the first amendment. For the reasons set out below, we conclude that the district court should have abstained from considering the constitutionality of the statute's interpretation by the state real estate licensing agency pending review of this administrative interpretation by the state agency or the state courts.

I.

Appellee United Home Rentals (UHR) is a Texas corporation that owns and operates a real estate information service.[2] UHR places advertisements in newspapers indicating that real estate of a certain description is available for rent and listing the UHR office telephone number. Potential consumers may respond to the advertisement by calling UHR and requesting information about the property. The UHR employee who answers the telephone will inform the potential consumer that he must come to the office personally and purchase a "membership" or subscription to the service before any more

1. Tex.Rev.Civ.Stat.Ann. art. 6573a, (West Supp. 1983).

2. Appellee Livingston, a licensed real estate salesman, is the sole shareholder and director of UHR. Appellee Bushman is a licensed real estate broker employed full time by UHR but has no ownership interest in the company.

information will be released. Payment of the membership fee entitles the customer to examine a catalogue of rental property information maintained by UHR which contains the names and addresses of owners or landlords.

According to the stipulated facts, UHR employees perform the following functions

(1) Gathering rental information from landlords, classified ads, and other sources;

(2) Verifying the information on catalogued property and periodically checking its continued accuracy;

(3) Handling incoming telephone calls in response to ads or to give information regarding newly catalogued rental properties to subscribers;

(4) Explaining the information service and selling memberships to customers.

The same employee may perform one or more of these functions.

Approximately half of UHR's employees, primarily those in supervisory and counseling positions, are licensed under the Texas Real Estate License Act ("the Act"). Section 2 of the Act defines the activities requiring licensure:

(2) "Real estate broker" means a person who, for another person and for a fee, commission, or other valuable consideration, or with the intention or in the expectation or on the promise of receiving or collecting a fee, commission, or other valuable consideration from another person:

(A) sells, exchanges, purchases, rents, or leases real estate;

(B) offers to sell, exchange, purchase, rent, or lease real estate;

(C) negotiates or attempts to negotiate the listing, sale, exchange, purchase, rental, or leasing of real estate;

(D) lists or offers or attempts or agrees to list real estate for sale, rental, lease, exchange, or trade;

(E) appraises or offers or attempts or agrees to appraise real estate;

(F) auctions, or offers or attempts or agrees to auction, real estate;

(G) buys or sells or offers to buy or sell, or otherwise deals in options on real estate;

(H) aids, attempts, or offers to aid in locating or obtaining for purchase, rent, or lease any real estate;

(I) procures or assists in procuring of prospects for the purpose of effecting the sale, exchange, lease, or rental of real estate; or

(J) procures or assists in the procuring of properties for the purpose of effecting the sale, exchange, lease, or rental of real estate.

(3) "Broker" also includes a person employed by or on behalf of the owner or owners of lots or other parcels of real estate, at a salary, fee, commission, or any other valuable consideration, to sell the real estate or any part thereof, in lots or parcels or other disposition thereof. It also includes a person who engages in the business of charging an advance fee or contracting for collection of a fee in connection with a contract whereby he undertakes primarily to promote the sale of real estate either through its listing in a publication issued primarily for such purpose, or for referral of information concerning the real estate to brokers, or both.

(4) "Real estate salesman" means a person associated with a Texas licensed real estate broker for the purposes of performing acts or transactions comprehended by the definition of "real estate broker" as defined in this Act.

Tex.Rev.Civ.Stat.Ann. art. 6573a § 2 (West Supp.1983) (emphasis added).

Section 6 of the Act specifies the licensing requirements:

(b) To be eligible for a license, an individual must . . . satisfy the commission as to his honesty, trustworthiness, integrity, and competency. However, the competency of the individual, for the purpose of qualifying for the granting of licensure privileges, shall be judged solely on the basis of the examination referred to in Section 7 of this Act.

Tex.Rev.Civ.Stat.Ann. art. 6573a § 6 (West Supp.1983).

Section 7(a), Tex.Rev.Civ.Stat.Ann. art. 6573a § 7(a) (West Supp.1983), sets out nine "core real estate courses" that an applicant must have studied before he or she may take an examination for the real estate license. The core courses include subjects such as: principles of real estate, real estate appraisal, real estate law, real estate finance, real estate marketing, real estate mathematics, real estate brokerage, property management, and real estate investments.

Pursuant to the rulemaking power granted it in Section 2 of the Act, appellant Texas Real Estate Commission ("the Commission") has enacted the following relevant regulations:

Rule 402.03.02

.003.4 Real estate broker licensure is required for the operation of a rental agency. This section does not prohibit employment of an answering service which is identified to callers as such and which provides information concerning the size, price and terms of property advertised.

.005.1 Locating and bringing together a buyer and seller through correspondence or telephone constitutes negotiation if done from within the borders of Texas.

005.5 Real estate licensure is required of rental agents doing all solicitation by telephone unless such agents are employees of the owner of the property concerned.

.005.6 A clerical employee of a real estate broker is not required to be licensed if such employee engages in no solicitation work and does not hold himself or herself out as authorized to act as a real estate agent.

.005.7 Answering of the telephone and acts of a secretarial nature done in a broker's office do not require real estate licensure.

.010.1 (a) Real estate licensure is required for the operation of an apartment selector/locator service or home-finding service in Texas.

.010.2 (b) The compilation and sale of listings of rental vacancies available in an area is activity requiring real estate licensure. This is true even if the property is not shown, sold, leased or managed.

.011.1 This section prohibits a person not licensed as a Texas real estate broker or salesman from receiving a referral fee from another concerning the sale, exchange, purchase, rental or lease of real estate.

.011.2 Real estate licensure is required for one to procure or assist in the procuring of prospective tenants of real property for compensation in any form, including but not limited to rent bonuses, discounts, gifts or other things of value.

.011.3 The referral of a prospective purchaser, for compensation, is an act requiring real estate licensure.

.013.1 Real estate licensure is required of those who advertise for others regarding real property, accept calls

received in response to such advertisements, and refer the callers to the owner of the property.

The Commission has interpreted the Act and the regulations promulgated pursuant to it to require licensure of UHR employees performing the clerical tasks described above (i.e. gathering, verifying and distributing rental information). Accordingly, the Commission has commenced administrative proceedings to revoke the licenses of appellees Livingston and Bushman on the grounds that they had associated with unlicensed persons who had performed acts requiring a license.[3] Pursuit of these administrative actions has been deferred until the present litigation is resolved. Also, the Commission initially denied applications for licenses by three UHR employees on the ground that they misrepresented their activities as UHR employees in their applications.[4] However, during the pendency of this appeal, these licenses have in fact been issued.

In a previous federal action, UHR challenged the statute and regulations as applied on first amendment and equal protection grounds. Applying a due process analysis, the district court in that case ruled that the regulations did encompass UHR's activities, and that as applied to UHR, the regulations bore a rational relationship to the legitimate state goal of consumer protection. *United Home Rentals, Inc. v. Texas Real Estate Commission,* No. CA 3-80-0485-F (N.D.Tex. April 16, 1981) ("UHR I"). The court refused to consider UHR's first amendment argument.

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3. Section 15(4)(S) of the Act authorizes the Commission to suspend or revoke a real estate license on proof that a licensee is guilty of "establishing an association, by employment or otherwise, with an unlicensed person who is expected or required to act as a real estate licensee, or aiding or abetting or conspiring with a person to circumvent the requirements of this Act."

4. Applicants for a real estate license must pledge that they have not performed and will not perform activities requiring a license until they obtain such license. According to the Commission, the employees of UHR violated this pledge by working for UHR prior to obtaining a license.

UHR then refiled in the same federal district court,[5] mounting the same first amendment and equal protection attacks on the statute as applied. Without any reference to the earlier action, the district court below ruled that the statute and regulations encompassed UHR's activities, and that as applied the statute violated UHR's first amendment rights of commercial speech. *United Home Rentals v. Texas Real Estate Commission,* 548 F.Supp. 566 (N.D.Tex.1982). The district court also held that the parties had "settled any questions abstention" by stipulating that they waived their rights to demand abstention. *Id.* at 570.

II.

While we are impressed by the parties' maneuvers to get an initial ruling on the first amendment question from a federal court, we cannot overlook the serious and repeated procedural transgressions that have taken place in the course of this action. Arguably, the claim advanced in this second federal action is precluded by the first federal judgment. Certainly, the initial review of the constitutionality of a state agency's interpretation of its own rules is a matter that the federal courts should undertake only when circumstances warrant it and abstention would serve no purpose. The instant case presents a paradigm of a situation in which the correct action for the federal courts is to abstain. In short, we should not entertain this case.

Res Judicata

Res judicata is a judicially-created doctrine designed to avoid repeated litigation of the same claims by the same parties. "True" res judicata, or "claim preclusion," as aptly defined by Judge Rubin of our court,

> treats a judgment once rendered, as the full measure of relief to be accorded between the same parties on the same

5. The case was assigned to a different judge.

> "claim" or "cause of action." . . . When the plaintiff obtains a judgment in his favor, his claim "merges" in the judgment; he may seek no further relief on that claim in a separate action. Conversely, when a judgment is rendered for a defendant, the plaintiff's claim is extinguished; the judgment then acts as a "bar . . . . Under these rules of claim preclusion, the effect of a judgment extends to the litigation of all issues relevant to the same claim between the same parties, whether or not raised at trial.[6]

In its earlier action, UHR asserted that the statute was unconstitutional as applied on both first amendment and equal protection grounds. The record indicates that the *UHR I* court refused to decide the first amendment question. Nonetheless, if on these facts UHR's first amendment and equal protection arguments are part of the same "claim" for res judicata purposes, the judgment of the district court in *UHR I* may bar UHR from subsequently attacking the statute on either theory.

The definition of a claim or cause of action for res judicata purposes in the federal system, where joinder of claims is not mandatory,[7] has been much debated.[8] This Circuit has definitively established as the standard to be applied in determining whether the substance of the two actions is the same for res judicata purposes the transactional test of a "claim" enunciated in the Second Restatement of Judgments. *Nilsen v. City of Moss*

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6. *Kaspar Wire Works, Inc. v. Leco Engineering & Machine, Inc.*, 575 F.2d 530, 535 (5th Cir.1978). In this opinion we likewise use the term "res judicata" to refer to claim preclusion, as opposed to collateral estoppel, or issue preclusion. *See Kaspar Wire Works*, 575 F.2d at 535-36 (discussing distinction).

7. Fed.R.Civ.Proc. 18 provides for permissive joinder of claims in the federal courts.

8. *See generally* Wright & Miller, Federal Practice and Procedure: Jurisdiction, §4407 (West 1978) (advocating transactional definition).

Point, 701 F.2d 556, 559-60 & n. 4 (5th Cir.1983) (en banc).[9] The transaction involved here is the Commission's demand that all UHR employees "that communicate with the public" be

9. § 24. Dimensions of "Claim for Purposes of Merger or Bar—General Rule Concerning "Splitting"

(1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar (see §§18, 19), the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.

Restatement (Second) of Judgments (1982).

The drafters of the Second Restatement offer the following comment:

A. *Rationale of a transactional view of claim.* In defining claim to embrace all the remedial rights of the plaintiff against the defendant growing out of the relevant transaction (or series of connected transactions), this Section responds to modern procedural ideas which have found expression in the Federal Rules of Civil Procedure and other procedural systems.

"Claim," in the context of *res judicata*, has never been broader than the transaction to which it related. But in the days when civil procedure still bore the imprint of the forms of action and the division between the law and equity, the courts were prone to associate claim with a single theory of recovery, so that, with respect to one transaction, a plaintiff might have as many claims as there were theories of the substantive law upon which he could seek relief against the defendant. Thus, defeated in an action based on one theory, the plaintiff might be able to maintain another action based on a different theory, even though both actions were grounded upon the defendant's identical act or connected acts forming a single life-situation. In those earlier days there was also some adherence to a view that associated claim with the assertion of a single primary right as accorded by the substantive law, so that if it appeared that the defendant had invaded a number of primary rights conceived to be held by the plaintiff, the plaintiff had the same number of claims, even though they all sprang from a unitary concurrence [sic]. There was difficulty in knowing which rights were primary and what was their extent, but a primary right and the corresponding claim might turn out to be narrow. Thus it was held by some courts that a judgment for or against the plaintiff in an action for personal injuries did not preclude an action by him for property damage occasioned by the same negligent conduct on the part of the defendant—this deriving from the idea that the right to be free of bodily injury was distinct from the property right.

Still another view of claim looked to sameness of evidence; a second action was precluded where the evidence to support it was the same as that needed to support the first. Sometimes this was made the sole test of

licensed[10] and UHR's contention that the federal Constitution bars the Commission from interpreting the statute in this fashion. Applying this test, it appears that the "cause of action" sought to be asserted by UHR in this action is the same as that decided adversely to UHR in *UHR I*.[11] *Cf. Jones v. Texas Tech Univ.*, 656 F.2d 1137 (5th Cir.1981) (affirming district court dismissal of second suit as barred by res judicata where plaintiff denied permission to demonstrate without restriction alleged first amendment and due process violations in first suit, consent judgment was entered, and plaintiff subsequently asserted due process claim based on University's conduct of disciplinary proceedings); *Southern Jam, Inc. v. Robinson*, 675 F.2d 94 (5th

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identity of claim; sometimes it figured as a positive but not as a negative test; that is, in certain situations a second action might be precluded although the evidence material to it varied from that in the first action. Even so, claim was not coterminous with the transaction itself.

The present trend is to see claim in factual terms and to make it coterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff; regardless of the number of primary rights that may have been invaded; and regardless of the variations in the evidence needed to support the theories or rights. The transaction is the basis of the litigative unit or entity which may not be split.

Restatement (Second) of Judgments, §24 comment A. (1982).

The Restatement further specifies:

6. C. Transaction may be single despite different harms, substantive theories, measures or kinds of relief. That a number of different legal theories casting liability on an actor may apply to a given episode does not create multiple transactions and hence multiple claims. This remains true although the several legal theories depend on different shadings of the facts, or would emphasize different elements of the facts, or would call for different measures of liability or different kinds of relief....

Restatement (Second) of Judgments, §24 comment C. (1982).

10. Counsel for the Commission so defined at oral argument the group of employees whom the Commission feels require licensure.

11. As counsel for UHR conceded at trial, discussing the prior action: "The facts haven't changed a whit really. You have a different standard." Tr. at 7.

Cir.1982) (affirming district court dismissial on res judicata grounds where plaintiff challenged regulation preventing it from holding concert on federal equal protection and due process grounds in state court, received adverse judgment, and subsequently filed first amendment claim in federal court) (applying Georgia law).

As we stated in *Nilson:*

> That the issue presented here was never decided in the former case does not signify; accordingly to general theories of judicial estoppel, to which "federal courts have traditionally adhered," it is blackletter law that *res judicata,* by contrast to narrower doctrines of issue preclusion, bars all claims that were or *could have been* advanced in support of the cause of action on the occasion of its former adjudication, *Allen v. McCurry,* 449 U.S. 90, 94, 101 S.Ct. 411, 414, 66 L.Ed.2d 308 (1980) (issue preclusion by state judgment in §1983 action, dicta that claim preclusion doctrine equally applicable), not merely those that were adjudicated. And it is equally settled that one who has a choice of more than one remedy for a given wrong . . . may not assert them serially, in successive actions, but must advance all at once on pain of bar.

701 F.2d at 560.

Despite our conviction that these plaintiffs have had two bites at the apple, we are reluctant to dispose of this appeal on res judicata grounds. First, res judicata is an affirmative defense, and the Commission has not raised it either at trial or before us. Rather, both parties have treated *UHR I* simply as precedent, using it for the proposition that the statutes in question as applied to rental information agencies have survived a rational relationship test. This failure to assert res judicata as a defense does not determine the issue, however, since in the interest of judicial economy res judicata may properly be raised by a district court sua sponte, particularly

where both actions are brought in the courts of the same district. *See Boone v. Kurtz,* 617 F.2d 435, 436 (5th Cir.1980) (affirming district court sua sponte dismissal on res judicata grounds); *Willis v. Fournier,* 418 F.Supp. 265, (D.C.Ga.), *aff'd* 537 F.2d 1142 (5th Cir. 1976); *Hicks v. Holland,* 235 F.2d 183 (6th Cir.), *cert. denied,* 352 U.S. 855, 77 S.Ct. 83, 1 L.Ed.2d 66 (1966) (same). On occasion, appellate courts have raised the issue for the first time on appeal. *See Robertson v. Interstate Securities Co.,* 435 F.2d 784, 787 n. 4 (8th Cir. 1971); *Wilson v. United States,* 166 F.2d 527, 529 (8th Cir.1948). In these cases, however, the appellate court considered applying res judicata as a means to affirm the district court decision below.

On these facts, we decline to take the drastic step of invoking res judicata for the first time on appeal and reversing the district court below as a consequence. What scanty evidence of the prior action appears on this record indicates that, far from having a full and fair opportunity to litigate the first amendment issue in the prior action,[12] plaintiffs were expressly denied that opportunity by the district court.[13] While the proper course for UHR's counsel would have been to appeal the refusal of the district court to hear his first amend-

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12. *Compare Nilson,* 701 F.2d at 564 (claims of second suit barred by res judicata "since . . . the procedural system offered a full and fair opportunity for litigation of [the theory asserted in the second suit] had it been presented").

13. Plaintiff's counsel stated at trial:

> And I want to be clear with the Court. I have a consideration that it looks like I'm taking two bites of the apple. I attempted to get Judge Porter to hear this argument. When he wouldn't and reserved it for another time, before I refiled, I attempted—I assumed I needed to refile in his Court and was told, no, I shouldn't; I should file it normally. And when we filed it, I checked with your clerk to see if it should be transferred to Judge Porter, and he said, "No, this is where it should be." I wanted to be clear with the Court that I'm not attempting to back door you, that there has been another—I may have done something to your clerk.
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> THE COURT: Well, you got him in trouble. He could have let it go back to Judge Porter.
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> MR. BRUTSCHE: I don't think Judge Porter wanted it back, Judge.

ment claim, rather than to refile, it appears unduly harsh to preclude UHR from having its first amendment argument heard because of this procedural error. *See Howell v. State Bar of Texas,* 674 F.2d 1027 (5th Cir.1982) *vacated and remanded on other grounds,*—U.S.—, 103 S.Ct. 1515, 75 L.Ed.2d 942 (1983) (where plaintiff withheld his federal constitutional arguments from the state courts after the federal district court erroneously relegated him to the state system with a promise that he could return with his federal claims, plaintiff did not have a full and fair opportunity to litigate those claims and would not be barred by res judicata.)

We must also consider whether the prior federal judgment has any collateral estoppel effects in this action. Collateral estoppel, or issue preclusion, bars relitigation of issues actually litigated and necessarily adjudicated in a prior proceeding between the same parties. Here, the district court in *UHR I* ruled: 1) that the statute did require plaintiff's employees performing the activities in question to be licensed, and 2) that this interpretation of the licensing requirement bore a rational relationship to a legitimate state end of consumer protection. Thus, in this second suit, the affirmative defense of collateral estoppel, if asserted, would bar the plaintiffs from relitigating either 1) that the statute did not require licensure of their clerical-type employees, or 2) that such a requirement violated their due process rights. Neither the parties nor the court below, however, raised any estoppel issue. Rather, the court below implicitly redetermined, *de novo,* the question of the statute's applicability in ruling that as applied to UHR's clerical-type employees the statute violated UHR's first amendment rights of commercial speech.

The parties to this litigation and the court below have consistently treated the prior litigation as of no more than precedential effect. We see no occasion to declare on our own motion that the prior judgment has more than precedential value. Accordingly we decline to ourselves raise and apply collateral estoppel to the court's findings in *UHR I.*

Abstention

The landmark case of *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), established the principle that "a federal court may, and ordinarily should, refrain from deciding a case in which state action is challenged in federal court as contrary to the federal constitution if there are unsettled questions of state law that may be dispositive of the case and avoid the need for deciding the constitutional question."[14] While the doctrine of abstention has developed extensively over the years since *Pullman*,[15] *Pullman* abstention remains the best-settled of the abstention variants.

> One type of case almost universally recognized as appropriate for abstention is that of a state statute, not yet construed by the state courts, which is susceptible of one construction that would render it free from

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14. "Abstention in such circumstances not only serves to minimize federal-state friction, but also avoids premature and perhaps unnecessary constitutional adjudication." *Kusper v. Pontikes*, 414 U.S. 51, 94 S.Ct. 303, 38 L.Ed.2d 260 (1973), *citing Harman v. Forssenius*, 380 U.S. 528, 534, 85 S.Ct. 1177, 14 L.Ed.2d 50 (1965). *See generally* Wright & Miller, *supra*, at §4242, and cases cited *id.* in notes 3 and 4.

15. The principal abstention doctrines that have been recognized in addition to *Pullman* abstention are *Burford* and *Younger* abstention. *Burford* abstention is appropriate where a major case presents issues of state law such that the state has an overriding interest in their determination. *See Colorado River Water Conservation District v. United States*, 424 U.S. 800, 814, 96 S.Ct. 1236, 1244, 47 L.Ed.2d 483 (1976); *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943); *BT Investment Managers, Inc. v. Lewis*, 559 F.2d 950, 955 (5th Cir. 1977). A federal court may invoke *Burford* abstention "to avoid needless conflict with the administration by the state of its own affairs." Wright, Federal Courts §52, at 222 (3d ed. 1976). *Younger* abstention is appropriate "where absent bad faith, harassment, or a patently invalid state statute, federal jurisdiction has been invoked for the purpose of restraining state criminal proceedings." *Colorado River Water Conservation District v. United States*, 424 U.S. at 816, 96 S.Ct. at 1245; *see Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). *See generally* Field, The Abstention Doctrine Today, 125 U.Pa.L.Rev. 590 (1977). We do not attempt a full discussion of abstention doctrine in its myriad variations here; it is not necessary. This opinion merely discusses the applicability of *Pullman*-type abstention to the facts of this case.

> federal constitutional objection and another that would not. A federal court should not place itself in the position of holding the statute unconstitutional by giving it the latter construction, only to find that the highest court of the state will render the decision futile and unnecessary by adopting the former. Such a decision not only is a waste of judicial resources but provokes a needless collision between state and federal power.

Friendly, Federal Jurisdiction: A General View, 93 (1973).[16]

The facts of this case fall squarely within the well-defined ambit of *Pullman* abstention. "In the bulk of abstention cases in this Court, the unsettled issue of state law principally concerned the applicability of the challenged statute to a certain persons or a defined course of conduct, whose resolution in a particular manner would eliminate the constitutional issue and terminate the litigation." *Baggett v. Bullitt*, 377 U.S. 360, 376-78, 84 S.Ct. 1316, 1325-26, 12 L.Ed.2d 377 (1964) (citations omitted) *see* cases cited *id.*, n. 12. Here, UHR asserts that the Commission's interpretation of the statute, which would require licensure of UHR employees engaged in clerical tasks, is unconstitutional. As with any constitutional challenge to a statute "as applied," this claim involves two questions: 1) Is the Commission's interpretation of the statute correct? 2) Does that interpretation violate the federal constitution?

The former is a question of state law which, as far as this record indicates, has not been reviewed by the state courts. It is, moreover, a question dispositive of the constitutional questions: if a state agency or court were to find that the Commission had erred in concluding that UHR's clerical employees had to be licensed, the constitutional issues hotly contested here

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16. *See, e.g., Pullman, supra; Colorado River Water Conservation District v. United States*, 424 U.S. at 814, 96 S.Ct. at 1244 (1976); *Reetz v. Bozanich*, 397 U.S. 82, 85-87, 90 S.Ct. 788, 789-790, 25 L.Ed.2d 68 (1970); *Babbitt v. United Farm Workers, National Union*, 442 U.S. 289, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979); *Palmer v. Jackson*, 617 F.2d 424 (5th Cir.1980); *Ibarra v. Bexar County Hospital District*, 624 F.2d 44 (5th Cir.1980); *Central Power and Light Co. v. P.U.C. of Texas*, 592 F.2d 234 (5th Cir.1979).

would obviously be moot. The outcome of the administrative proceedings now pending against Mssrs. Livingston and Bushman—or a state court appeal from those proceedings—could moot or significantly modify the constitutional question before us.[17]

In the proceedings below, the parties attempted to preclude abstention and force a resolution of the constitutional issue in the federal courts by stipulating that they waived "their right to assert or demand abstention by the Court." *UHR I, supra,* at 570. The district court concluded that this stipulation "settled any questions of abstention." *Id.* This was error. Because the abstention doctrine is designed to balance the interests of the federal and state judicial systems and to avoid unnecessary adjudication of constitutional issues, a federal court should decide for itself whether to abstain on its own motion in *Pullman*-type cases, regardless of the wishes of the parties.[18] Accordingly, we now consider the propriety of abstention[19] on the facts of this case.[20]

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17. Our holdings on the res judicata and collateral estoppel questions leave the state agency or courts free to make the initial review of the Commission's action.

18. *See Ohio Bureau of Employment Services v. Hodory,* 431 U.S. 471, 480 n. 11, 97 S.Ct. 1898, 1904 n. 11, 52 L.Ed.2d 513 (1977); *Bellotti v. Baird,* 428 U.S. 132 n. 10, 96 S.Ct. 2857, 49 L.Ed.2d 844; *Empire Distributing Co. v. City of Fort Worth,* 273 F.2d 529 (5th Cir.1960).

19. Our review of the district court's refusal to abstain is predicated on a de novo standard. This circuit adopted a de novo standard of review of a district court's dicision to invoke or refuse to invoke *Pullman* abstention in its recent en banc decision in *O'Hair v. White,* 675 F.2d 680 (5th Cir.1982). *See also Ziegler v. Ziegler,* 632 F.2d 535 (5th Cir.1980) (de novo review); *cf. Brooks v. Walker County Hospital District,* 688 F.2d 334, 336 n. 4 (5th Cir.1982), *cert. denied,* — U.S. —, 103 S.Ct. 2452, 77 L.Ed.2d 1332 (1983) (discussing correct standard of review).

20. "The necessity for abstention is to be determined by principled discretion not doctrinaire adherence; its application must, therefore, be decided on a case-by-case basis." *Gibson v. Jackson,* 578 F.2d 1045, 1048 (5th Cir.1978), *cert. denied,* 439 U.S. 1119, 99 S.Ct. 1028, 59 L.Ed.2d 79 (1979) (citations omitted).

Initially, we note that the ambiguity of state law necessary to *Pullman* abstention exists here. We do not agree with the parties that the Real Estate License Act and the regulations promulgated thereunder clearly require licensing of UHR employees performing clerical tasks.[21]

The rules specifically authorize a real estate broker to employ unlicensed clerical employees and to have an answering service which gives out information as to properties available.[22] Arguably, UHR's employees who answer the telephone do no more than the clerical or secretarial employees of any broker who also "communicate with the public" by answering the phone.

The other rules which the state attempts to apply to UHR employees are similarly ambiguous. For example, the rules state that the compilation and sale of rental information is "an activity requiring licensure,"[23] but this language does not preclude the reasonable interpretation that while this activity must be done in the office of a licensed broker fully accountable for the acts of his employees, not every physical act involved in the compilation need be performed by a licensed broker.[24] Again, the rules require licensure of rental agents engaging in "solicitation"—"unless such agents are employees of the owner of the property concerned."[25] This rule apparently refers to "solicitation" on behalf of property owners—i.e. solicitation of prospective *tenants*—not the gathering of information about

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21. Nor are we bound, as the district court mistakenly believed, by the parties' stipulation to that effect. *See UHR I, supra,* at 570.

22. *See* Rule 402.03.02.003.4 (permitting answering services) and Rule 402.03.02.005.6 (permitting the employment of unlicensed clerical employees.).

23. *See* Rule 402.03.010.2(b).

24. Indeed, the state admitted at oral argument that portions of the act of compilation may be performed without a real estate license.

25. *See* Rule 402.03.02.005.5.

other rental properties. The record indicates that UHR does not solicit tentants for a particular landlord, but rather subscribes to its information service. We express no opinion on how the rules ought to be interpreted;[26] we seek only to show that, taken together, the rules are susceptible of a construction which would moot or significantly modify the constitutional issue.[27]

We cannot rule out the strong possibility that the state agency or the state courts will interpret the regulations at issue so as to obviate any potential first amendment violation.[28]

In reaching the decision that abstention is necessitated by the facts of this case, we have taken into account the disadvantages usually considered consequent to abstention: "piecemeal results and delay." *Ross v. Houston Independent School Dist.*, 559 F.2d 937, 942 (5th Cir.1977). A review of the facts of this case, however, reveals that those very problems would be exacerbated by our entertaining the claims presented here. The record reveals that before bringing this quarrel to federal

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26. The parties have not cited, nor has our own research disclosed, any decision from a Texas court construing the specific regulations at issue. Nor have we fould any cases dealing with situations so analogous that we could predict, with a reasonable degree of certainty, how the question would be resolved by the highest court of the state. The rules themselves are sufficiently vague and contradictory that they could reasonably be interpreted to require licensure of all UHR employees "communicating with the public," of only some of those employees, or of none. We therefore find that this case presents an unsettled issue of state law. *See* Field, Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine, 122 U.Pa.L. Rev. 1071, 1090-91 (1974).

27. *Cf. Brooks*, 688 F.2d at 336-7 (analyzing ambiguities of statute which allow *Pullman* abstention).

28. We note that during these proceedings the Commission has already reversed itself and granted licenses to those UHR employees previously denied licenses on the ground that as UHR employees they were engaging in activities requiring licensure without having a license. Perhaps the Commission is similarly willing to reconsider its position vis-a-vis the revocation of the licenses of Mssrs. Livingston and Bushman and to reach an accommodation with UHR.

court as a constitutional matter, the parties were engaged in a process of negotiation and compromise as to the scope of the licensing requirement.[29] This action has halted not only that process but state proceedings in which the parties could have arrived at a mutually satisfactory interpretation of the licensing requirements. For a federal court to adjudicate this controversy as a constitutional matter at this stage would indicate to other parties engaged in similar discussions with state agencies—and to the agencies themselves—that the federal courts will provide a ready solution to local disputes over state regulations.

> If [such state proceedings] are stayed, whether by stipulation or otherwise, while these issues are litigated over the course of several years through the tiers of the federal system, the possibilities of delay and piecemeal resolutions are interminably expanded. Such an encroachment of the federal government into ongoing state pro-

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Indeed, cases cited by the parties demonstrate that several state appellate courts have mooted any potential first amendment issue in similar fact situations either by ruling that the state licensing statute in question did not require licensure of clerical-type employees of rental information agencies, *see Real Estate Commission of Maryland v. Phares*, 268 Md. 344, 302 A.2d 1 (Md.1973) (rental information services not brokering within real estate licensing statute); *State of Minnesota v. Beslanoviwitch*, 311 Minn. 56, 248 N.W.2d 286 (Minn.1976) (same); or by enjoining such an application of the statute on state or federal constitutional grounds. *See Anderson v. Department of Real Estate*, 155 Cal.Rptr. 307, 93 Cal.App.3d 696, 699 (1979) (first amendment grounds); *United Interchange v. Spellacy*, 144 Conn. 647, 136 A.2d 801 (1957) (due process grounds); *United Interchange, Inc. v. Harding*, 154 Me. 128, 145 A.2d 94 (1958) (first amendment and due process grounds); *North Carolina Real Estate Licensing Board v. Aikens*, 31 N.C.App. 8, 228 S.E.2d 493 (1976) (state due process grounds); *but see Whitaker v. Arizona Real Estate Board*, 26 Ariz.App. 347, 548 P.2d 841 (1976) (where rental information service also counseled clients regarding property licensing statute constitutional as applied).

29. These negotiations had progressed to the point where UHR was willing to ensure that all original gathering of rental information would be done by licensed employees. The major sticking point appears to have been whether licensure would be required for employees calling to verify information.

> ceedings would be unseasonable and obstrusive. The "delay and expense to which application of the abstention doctrine inevitably give rise," *Bellotti v. Baird*, 1976, 428 U.S. 132, 150, 96 S.Ct. 2857, 2868, 49 L.Ed.2d 844, quoting *England v. Medical Examiners*, 1964, 375 U.S. 411, 418, 84 S.Ct. 461, 466, 11 L.Ed.2d 440, 446, would be even more acute if we did not abstain here.

Gibson v. Jackson, 578 F.2d at 1050-51.

Pullman mandates that a federal court faced with an initial review of a state agency's application of its own regulations, where that application is challenged on constitutional grounds, should abstain, absent compelling circumstances, in order to allow the state agency and the state courts first review of the interpretation of state law at issue and to avoid unnecessary constitutional adjudication.

The facts of this case required abstention under *Pullman*. On remand, the district court should dismiss this action without prejudice.[30]

The judgment below is

REVERSED AND REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION.

TATE, Circuit Judge, dissenting.

I respectfully dissent. I would affirm on the basis of the district court opinion. *United Home Rentals v. Texas Real Estate Commission*, 548 F.Supp. 566 (N.D. Tex.1982).

The Texas statute, if enforced as consistently interpreted and applied by the Texas administrative agency, in my view infringes on the plaintiffs' first amendment rights. The plaintiffs

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30. Usually a district court retains jurisdiction over a case when it abstains on *Pullman* grounds. However, the quirks of Texas law preclude retention of federal jurisdiction and thus dismissal without prejudice is the correct disposition. *See generally Moore v. El Paso County*, 660 F.2d 586 (5th Cir.1981), *cert. denied*,—U.S.—, 103 S.Ct. 51, 74 L.Ed.2d 57 (1982).

are clearly aggrieved by that intrepretation and enforcement in their own instances. Neither the Attorney General of Texas in his brief and argument in this court, nor the plaintiffs, argue that the statute is ambiguous, as the panel majority holds, and in my opinion no grounds exist for *Pullman* abstention—neither party raises the issue that the statute is not applied in accordance with its terms, see also district court, 548 F.Supp. at 570 ("No ambiguity in statute."). Thus interpreted and applied by the agency authoritatively entrusted with its administration, the statute is, it seems to me, unconstitutional on first amendment commercial free speech grounds. See 548 F.Supp. at 571-75.

Insofar as the parties are concerned, the panel opinion mostly deals with non-issues. The res judicata-collateral estoppel issue, not even raised by the State, seems to me to involve ultra-technical concerns that, upon full reflection, would not justify application of res judicata or collateral estoppel without fundamental disregard of the functional purposes of those principles and of the principles that underlie the Federal Rules of Civil Procedure.

Application here of the *Pullman* principle, expressly eschewed by the appellant State, serves only to delay and fragment decision of the central issue squarely raised by this litigation: Are the plaintiffs aggrieved by the requirement that they or their employees obtain real estate licenses to engage in commercial free speech protected against governmental restriction by the first amendment of the federal constitution? Texas argues that they are not—that it is entitled to exact licenses from employees before permitting them to exercise the free speech rights here at issue, under the unambiguous terms of the statute as authoritatively construed and consistently applied by the Texas agency entrusted with its administration. That the licenses to the employees were granted by the state agency does not moot the plaintiffs' claims, nor does it cast into doubt the still-asserted claim of Texas that licenses *are* unambiguously required by the Texas statute—unconstitutionally, the plaintiffs urge.

No grounds for *Pullman* abstention exist, in my opinion, and the panel is in error in not deciding on the merits the constitutional issue squarely posed to us.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
For the Northern Division of Texas
Dallas Division

UNITED HOME RENTALS, INC., MICHAEL A. LIVINGSTON, AND W. EUGENE BUSHMAN

vs.

TEXAS REAL ESTATE COMMISSION AND THE STATE OF TEXAS

CA 3-81-0809-C

OPINION

This is a suit under 42 U.S.C. §1983[1] and 28 U.S.C. §1331.[2] Plaintiffs complain that Defendants have violated their First Amendment Rights which have been made applicable to the States by the Fourteenth Amendment.[3]

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[1] 42 U.S.C. § 1983 reads:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

[2] 28 U.S.C. § 1331 reads:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

[3] The First Amendment to the Constitution specifies:

Congress shall make no law respecting an establishment or religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

and the Fourteenth Amendment, Section 1, specifies:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Parties in their Joint Motion for Pretrial Order entered into stipulations A through L as follows:

A. Plaintiffs own and operate and/or are employed in the rental information service industry in several locations throughout the State of Texas. The focus of the business is the compiling, cataloging, and sale of information about available rental property. This information is then made available to segments of the general public who choose to purchase a "policy" or "membership" for a specified fee which enables the customer to examine the catalogued information for a certain period of time, usually six months.

B. It is the intent of Plaintiffs that employees of the rental information service in each office perform one or more of the following functions:

(1) gathering rental information from landlords, classified ads, and other sources;

(2) certifying the accuracy of the information on catalogued property, and its contained availability for rental, on a periodic basis;

(3) handling incoming telephone calls to the office either in response to ads or to give information to existing policyholders as to newly catalogued rental properties;

(4) the explanation of services offered and the sale of policies to customers who come into the office.

One or more functions may be performed by the same or multiple employees within each office.

C. Plaintiff Livingston is the sole shareholder and sole director of United Home Rentals, Inc. Plaintiff Bushman is a real estate broker employed full time by Plaintiff United Home Rentals, Inc., but has no ownership interest in the company. Plaintiff Bushman currently holds a brokers license issued by Defendant TREC and Plaintiff Liv-

ingston, through the sponsorship of Plaintiff Bushman, is the holder of a salesman's license issued by TREC.

D. According to interpretations by Defendant TREC and its counsel, its Rules (Appendix 2) require that any employee that performs on any occasion any of the functions specified aforesaid in Paragraph VB be licensed as a salesman or broker under the provisions of the Real Estate License Act and the rules promulgated thereunder.

E. The Commission is currently demanding that such functions be performed only by licensed people or that Plaintiff United Home Rentals cease doing business. Defendant TREC has threatened (and in fact subsequent to the filing of suit, instituted) administrative proceedings against Plaintiffs Livingston and Bushman to revoke their licenses based upon their association with persons performing such functions who do not have licenses issued by Defendant TREC.

F. The minimal educational requirements for obtaining a real estate salesman's license since 1976 and as changed by the 1981 amendment to the law are as follows:

(1) January 1, 1976—30 classroom hours (plus 30 additional hours each for second and third annual certification);

(2) January 1, 1977—6 semester hours (90 classroom hours);

(3) January 1, 1979—12 semester hours (180 classroom hours);

(4) January 1, 1981—21 semester hours (315 classroom hours);

(5) April 23, 1981—12 semester hours with 6 hours in core real estate courses including 2 hours in Principles of Real Estate (plus additional semester hours for second, third and fourth annual certifications).

G. On April 23, 1980, Defendant TREC rejected license applications by three employees of Plaintiff United Home Rentals, Inc. on the basis they misrepresented their activities either past or future in their application for licensure to Defendant TREC. Specifically, the application requires them to affirm under oath that they have not performed activities requiring licensure and that they will not perform activities requiring licensure until the license is actually issued. Defendant TREC denied the applications on the basis that in working for Plaintiff United Home Rentals, Inc. each employee, necessarily and admittedly, performed one or more of the functions specified in paragraph VB, of the Rules (Appendix 2) without the benefit of a license from Defendant TREC. Accordingly, Defendant TREC has denied the applications on the basis that "the Texas Real Estate Commission is not satisfied that (employee) would conduct his real estate business with honesty, trustworthiness and integrity as required by . . . (the act)".

H. Defendant TREC has informed Plaintiffs that the act provides for and in fact has commenced administrative actions to revoke the licenses of Plaintiffs Bushman and Livingston (such commencement occuring April 24, 1980) on the basis that they have "associated with unlicensed persons".

I. Defendant TREC has informed Plaintiffs that the act provides for criminal prosecution of employees of Plaintiff United Home Rentals, Inc. not holding real estate licenses and performing any of the functions specified in paragraph VB of the Rules.

J. Defendant TREC has advised Plaintiff's counsel that it intends to immediately and vigorously prosecute enforcement proceedings pursuant to its authority as to Michael Livingston, Wesley Eugene Bushman, and United Home Rentals, Inc.'s employees, James Godfrey, Gerald Sheridan, and Kenneth Crain.

K. Companies in the rental information industries have been the subject of consumer complaints such as:

(a) not having the permission of the landlord to catalog property;

(b) cataloging property no longer available for rent;

(c) advertising property that did not really exist or that was no longer available;

(d) guaranteeing the results of a service and then not honoring such guarantees;

(e) promising the availability of property meeting the needs of a particular customer and then not having any such property.

L. Plaintiff United Home Rentals, Inc. has been the subject of such consumer complaints but has been responsive to resolving such consumer complaints. In 1976, Plaintiff United consented to an injunction against certain of such acts without admitting it had performed them. Mark McQuality and Joseph Chumlea, former Assistant Attorney Generals to the State of Texas—Consumer Division would testify that from October, 1976, to June, 1980, they processed approximately 37 complaints involving United Home Rentals, Inc. in the Dallas-Fort Worth area, and that said attorneys cannot recall any of those complaints that were not resolved to the satisfaction of the consumer. Said attorneys' personal knowledge is limited to the period commencing October, 1977. In April, 1980, Joseph Chumlea suggested that Plaintiff United put a catalog reference in its advertising referring to the specific piece of rental property being advertised so that consumers could verify that a property advertised was in fact listed by United. United Home Rentals immediately and voluntarily complied with that suggestion.

After trial, in response to a query by the Court concerning case or controversy under Article III, Section 2 of the Constitution[4] and abstention in the light of *Gibson v. Berryhill*, 411 U.S. 564, 574, the Parties entered into further stipulations. Stipulations numbered two through seven of this series are pertinent and recite:

> 2. *State action has occurred.*
>
> Defendant TREC has rejected license applications by three employees of Plaintiff United Home Rentals, Inc., and has commenced administrative action to revoke the licenses of Plaintiffs Bushman and Livingston. While these actions by TREC can be appealed, they are final if no affirmative action is taken by the affected parties.
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> 3. *Statute violated.*
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> Plaintiff United Home Rentals, Inc., Michael A. Livingston, and W. Eugene Bushman, have performed acts requiring licensure under the Texas Real

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[4] Art. III, Sec. 2, reads:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.
>
> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the Supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.
>
> The trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Estate License Act and the rules and regulations promulgated thereunder. The acts performed to provide an advance fee rentals information service such as that provided by Plaintiffs are brokering activities as defined by the Act and require a real estate license under the Texas Real Estate License Act. United Home Rentals employees have performed such actions without licensure in violation of said Act.

4. *No ambiguity in statute.*

Provisions of the Texas Real Estate License Act, art. 6573 (a), V.A.C.S., and the rules and regulations promulgated thereunder are not ambiguous and clearly cover the actions of Plaintiffs and their employees. The statute is not fairly susceptible to a reading that would avoid the need to decide the Constitutional issue.

5. *Only issue is Federal Constitutional issue.*

The only disputed fact issues before the Court are: (1) Whether the definition of real estate broker and licensure requirements of the Texas Real Estate License Act are so broad as to violate Plaintiffs' Constitutional protection of free commercial speech and press when applied to Plaintiffs' activities as advance fee rentals agent; (2) whether said requirements bear a rational relationship to the governmental purpose for such licensure when applied to Plaintiffs' activities; (3) whether the rules and regulations regarding said requirements for activities performed by Plaintiffs are so overly broad as to violate the constitutional protection of free commercial speech and press when applied to Plaintiffs' activities as advance fee rental agents; and (4) whether the statute and regulations in fact impact Constitutionally protected rights of speech and/or press or just impact regulatable activities.

6. *Waiver.*

Defendants TREC and The State of Texas waive their right to assert or demand abstention by the Court in this cause.

7. *Prescribed state administrative procedures have been complied with in such a way that no other administrative remedies are applicable to this cause.*

To the extent any available administrative remedies can be pursued by Plaintiffs, Defendants waive any further application of the doctrine of exhaustion of administrative remedies.

It does appear that the Parties have presented a live controversy to this Court and have settled any questions of abstention.

The paramount question in this case is whether the State of Texas can subject Plaintiffs to licensure under the Texas Real Estate License Act, Art. 6573(a), Vernon's Ann.Civ.St. Plaintiffs say no because to do so would trample their rights of free commercial speech and press.

As this is a commercial speech case, it is governed by the Supreme Court's decision in *Central Hudson Gas v. Public Service Commission, 447 U.S. 557 (1980).*

The Court set out a four part test in that case. Those components are:

(1) Is the speech protected by the First Amendment?

(2) Is the governmental interest asserted substantial?

(3) Does the regulation directly advance the governmental interest asserted? and

(4) Is the regulation more extensive than is necessary to serve that interest?

To answer the first question, it must first be decided just who is speaking? In this instance, it is the apartment, duplex and home renters who are seeking to disseminate information about rental properties. Most assuredly, this is the sort of information that is protected by the First Amendment.

In being a means of disseminating this information Plaintiff United Homes Rental is fulfilling the same function as a newspaper which carries classified advertising.

Just as newspapers seek listings in their classified sections for rental properties, so do Plaintiffs seek listings for rental properties. Newspapers, after they receive a listing, then seek to disseminate this information to a group limited only by the individual's willingness to purchase a subscription or an individual edition of that paper. Plaintiffs, functionally, do the same. They seek to disseminate the same information to a group limited only by the individual's willingness to purchase a "policy" or "membership" for a stated time period. That Plaintiffs choose to receive compensation for their services from only those seeking housing and not those offering housing is a distinction without a difference.

The Supreme Court in the case of *Lovell v. Griffin*, 303 U.S. 444 (1937) said at page 452: "The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." The Court also said in *Ex parte Jackson*, 96 U.S. 727, at 733: "Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value."

The best statement by The State of Texas as to the interest asserted may be found at page one of its trial brief. There, it has stated: " . . . the challenged statute does not restrict speech in any way. Rather, it restricts the profession of real estate brokering to licensed individuals."

The legal counsel for the Texas Real Estate Commission stated at trial that the purpose of licensure of these individuals

is consumer protection.[5] The consumer is protected in that an applicant for a license under the Texas Real Estate License Act ("the Act") must, as required by Sec. 6(b) of that act, show "his honesty, trustworthiness, integrity, and competency." Surely, The State of Texas does have a substantial interest in thusly protecting its citizens in such a vital commerce as the market for housing, one of the fundamental needs of its citizens.

The Texas Real Estate License Act does directly advance the interest asserted. Section 6 in paragraphs (b) & (c) specifies that the competency of an applicant "shall be judged soley on the basis of the examination referred to in Section 7 of this Act." Section 7(a) sets out nine "core real estate courses" that an applicant must have studied before he or she may take an examination for a real estate license. Those courses are listed and described as:

> (1) Principles of Real Estate (or equivalent) shall include but not be limited to an overview of licensing as a real estate borker and salesman, ethics of practice, titles to and conveyancing of real estate, legal descriptions, law of agency, deeds, encumbrances and liens, distinctions between personal and real property, contracts, appraisal, finance and regulations, closing procedures, and real estate mathematics.
>
> (2) Real Estate Appraisal (or equivalent) shall include but not be limited to the central purposes and functions of an appraisal, social and economic determinant of value, appraisal case studies, cost, market data and income approaches to value estimates, final correlations, and reporting.
>
> (3) Real Estate Law (or equivalent) shall include but not be limited to legal concepts of real estate, land description, real property rights and estates in land, con-

[5] Transcript of the Preliminary Injunction hearing, p.62.

tracts, conveyances, encumbrances, foreclosures, recording procedures, and evidence of titles.

(4) Real Estate Finance (or equivalent) shall include but not be limited to monetary systems, primary and secondary money markets, sources of mortgage loans, federal government programs, loan applications, processes and procedures, closing costs, alternative financial instruments, equal credit opportunity acts, community reinvestment act, and state housing agency.

(5) Real Estate Marketing (or equivalent) shall include but not be limited to real estate professionalism and ethics, characteristics of successful salesmen, time management, psychology of marketing, listing procedures, advertising, negotiating and closing, financing, and the Deceptive Trade Practices-Consumer Protection Act, as amended, Section 17.01 et seq., Business & Commerce Code.

(6) Real Estate Mathematics (or equivalent) shall include but not be limited to basic arithmetic skills and review of mathematical logic, percentages, interest, time-valued money, depreciation, amortization, proration, and estimation of closing statements.

(7) Real Estate Brokerage (or equivalent) shall include but not be limited to law of agency, planning and organization, operational policies and procedures, recruiting, selection and training of personnel, records and control, and real estate firm analysis and expansion criteria.

(8) Property Management (or equivalent) shall include but not be limited to role of property manager, landlord policies, operational guidelines, leases, lease negotiations, tenant relations, maintenance, reports, habitability laws, and the Fair Housing Act.

(9) Real Estate Investments (or equivalent) shall include but not be limited to real estate investment characteristics, techniques of investment analysis, time-valued money, discounted and nondiscounted investment criteria, leverage, tax shelters depreciation, and applications to property tax.

Section 7 in paragraph (k) also requires all applicants to have taken further coursework as follows:

(k) All applicants for licensure must complete at least three classroom hours of coursework on federal, state, and local laws governing housing discrimination, housing credit discrimination, and community reinvestment or as least three semester hours of coursework on constitutional law.

The mere reading of these coursework requirements brings home the desirability of ensuring the competence of the real estate profession. It is more than reasonable for The State of Texas to require real estate professionals to be licensed so that the public can be assured that the members of that profession are well versed in these complicated subject areas. Thus, on its face, the Act directly advances the governmental interest that has been asserted as its reason for existence.

The fourth part of the test required by the Supreme Court in *Central Hudson Gas*, supra, is whether or not the regulation is more extensive than necessary to serve the State's interest? In this instance before the Court, Plaintiffs are not challenging the statute on its face but are challenging the gloss put on it by the Texas Real Estate Commission.

As part of Plaintiff's Exhibit No. 11, a letter dated October 18, 1978, written by the Legal Counsel to the Texas Real Estate Commission sets out the following rules of the Commission as governing the requirements for licensure of persons in Plaintiffs' field of endeavor:

Rule 402.03.02

.003.4 Real estate broker licensure is required for the operation of a rental agency. This section does not prohibit employment of an answering service which is identified to callers as such and which provides information concerning the size, price and terms of property advertised.

.005.1 Locating and bringing together a buyer and seller through correspondence or telephone constitutes negotiation if done from within the borders of Texas.

.005.5 Real estate licensure is required of rental agents doing all solicitation by telephone unless such agents are employees of the owner of the property concerned.

.005.6 A clerical employee of a real estate broker is not required to be licensed if such employee engages in no solicitation work and does not hold himself or herself out as authorized to act as a real estate agent.

.005.7 Answering of the telephone and acts of a secretarial nature done in a broker's office do not require real estate licensure.

.010.1 (a) Real estate licensure is required for the operation of an apartment selector/locator service or home-finding service in Texas.

.010.2 (b) The compilation and sale of listings of rental vacancies available in an area is activity requiring real estate licensure. This is true even if the property is not shown, sold, leased or managed.

.011.1 This section prohibits a person not licensed as a Texas real estate broker or salesman from receiving a referral fee from another concerning the sale, exchange, purchase, rental or lease of real estate.

.011.2 Real estate licensure is required for one to procure or assist in the procuring of prospective tenants of real property for compensation in any form, including but not limited to rent bonuses, discounts, gifts or other things of value.

.011.3 The referral of a prospective purchaser, for compensation, is an act requiring real estate licensure.

.013.1 Real estate licensure is required of those who advertise for others regarding real property, accept calls received in response to such advertisements, and refer the callers to the owner of the property.

On the face, it would appear that these rules are resonable and would legitimately cover the activities of the Plaintiffs. They plausibly encompass activities which fall within the sweep of Section 2(2) of the Act defining just who is a real estate broker. That Subsection reads:

"Real estate broker" means a person who, for another person and for a fee, commission, or other valuable consideration, or with the intention or in the expectation or on the promise of receiving or collecting a fee, commission, or other valuable consideration from another person:

(A) sells, exchanges, purchases, rents, or leases real estate;

(B) offers to sell, exchange, purchase, rent, or lease real estate;

(C) negotiates or attempts to negotiate the listing, sale, exchange, purchase, rental, or leasing of real estate;

(D) lists or offers or attempts or agrees to list real estate for sale, rental, lease, exchange, or trade;

(E) appraises or offers or attempts or agrees to appraise real estate;

(F) auctions, or offers or attempts or agrees to auction, real estate;

(G) buys or sells or offers to buy or sell, or otherwise deals in options on real estate;

(H) aids, attempts, or offers to aid in locating or obtaining for purchase, rent, or lease any real estate;

(I) procures or assists in the procuring of prospects for the purpose of effecting the sale, exchange, lease or rental of real estate; or

(J) procures or assists in the procuring of properties for the purpose of effecting the sale, exchange, lease, or rental of real estate.

So on its face, the Act and the Texas Real Estate Commission Rules promulgated under it, appear to meet Constitutional muster. But let us look at prongs two, three and four of the *Central Hudson Gas,* supra, test in the context of the situation presently before this Court.

First of all, it is useful to distinguish between the business of Plaintiffs and that of apartment locator services. The latter sell their services to landlords and are compensated for each tenant procured by the apartment locator services. These services are usually licensed under the Act. The locator services also take prospective tenants around to various rental properties and show the properties to them. Licensure would appear to be appropriate as these services are really acting as agents for the landlord in procuring tenants.

But Plaintiffs' business is different. They do not receive compensation on the closing of a real estate sale or upon the signing of a lease agreement. They receive their compensation at the beginning, in advance of the furnishing of any information to a prospective tenant. Plaintiffs also either allow their

customers to read the information about listings off of cards maintained in their offices or read the information to their customers over the phone, for a slight additional fee. Plaintiffs do not counsel their customers as to suitable properties nor do they show rental properties to their customers. One might say that locator services are selling to landlords the service of procuring tenants and Plaintiffs are selling prospective tenants the service of providing information about dwellings open for rent.

Clearly, there is a meaningful distinction between these two businesses. The services performed by apartment locator services are much greater and of a different quality from those performed by Plaintiffs.

It can readily be seen that apartment locator service employees should be licensed to ensure that they are versed with the coursework required in order to obtain a license under the Act. Their livelihood depends on their ability to determine the needs of prospective tenants and to persuade the prospective tenants to lease dwellings shown by them. Another reading of the coursework requirements of the Act, supra, in and of itself, shows the desirability of a locator service having knowledge of at least some of this coursework. Surely, such an employee would need knowledge of lease contracts and their legal effects, real estate marketing and property management in order to do their job.

This is in great contrast to Plaintiffs' business. The stipulations entered into by the Parties, the text of the Act and the testimony at the Preliminary Injunction hearing show only that it might be helpful for an employee in the rental service information industry to be familiar with some of the terminology of the real estate business. It is, no doubt, helpful for any person who deals with information related to any field of endeavor to be conversant with the terminology used in that field. This reed is too slender to carry the weight of the licensing requirements of the Act.

Both Plaintiffs and Defendants appear to agree that the ills of the rental information service industry are covered by the Texas Deceptive Trade Practices-Consumer Protection Act, V.T.C.A. Bus. & C. §17.41 et seq. Both Parties also agree that Plaintiffs did have some problems with consumer complaints when they started in business (see stipulation L, supra) but that there have been no unresolved problems since 1976.

It is true that the coursework requirements of the Act do require a familiarity with the D.T.P.-C.P.A. But this is an act of general applicability. Any person who is dealing with the public in the State of Texas should be familiar with the consumer protection statutes, state and federal, that are applicable.

The Legal Counsel to Defendants did testify that numerous complaints had been made to the Attorney General of the State of Texas and to Defendants about firms in the rental information service industry. He also stressed that it is the position of the Defendants that it is better to regulate this industry in advance than to merely provide a remedy after malfeasance, misfeasance or nonfeasance.

The Court will agree that usually this is a decision that a state can make without running afoul of the Constitution. But we are dealing with the First Amendment made applicable to the States by the Fourteenth Amendment.

The whole question before this Court may be boiled down to asking whether Plaintiffs are in the real estate business or in the information business? It seems clear that Plaintiffs offer only an exchange of information for a set fee. They or their employees do not counsel either landlords or tenants. They do not show properties. They get invlolved in neither lease negotiations nor contract legalities. They offer the same service that newspapers do, an exchange of information. They just do not appear to be in the real estate business any more than a newspaper that solicits classified advertisements lising homes for lease or sale is in the real estate business. Accord: *Real*

Estate Commission of Maryland v. Phares, 268 Md. 334, 302 A.2d 1 (1973), *North Carolina Real Estate Licensing Board v. Aikens*, 31 N.C. App. 8 (1976).

If Plaintiffs were carrying on such acitivities as counseling prospective tenants, the substantial interest of the State of Texas in regulating the real estate business in Texas would come into play. This is also to say that the Texas Real Estate Commission's attempt to regulate Plaintiffs' business does not directly advance that substantial interest and the regulation is much more extensive than necessary.

That other persons or entities might run afoul of the Act by providing more than pure information is without moment. That Plaintiffs may have run afoul of the Texas Deceptive Trade Practices-Consumer Protection Act some years ago and other entities in the rental information industry may be presently afoul of that law is insufficient reason to bring Plaintiffs under the strictures of the Texas Real Estate License Act. Just as the coursework requirements of the Act have minimal relevance to Plaintiffs' business, the moral character of them and their employees is no more relevant that it is for anyone who deals with the public in any way. Plaintiffs and their employees are not fiduciaries to either prospective tenants or landlords; they never hold funds in escrow; they do not negotiate contracts involving the lease or sale of real estate nor do they ever have an interest in such contracts. They just do not hold positions of trust and confidence so that licensure would directly advance the substantial interest of the State of Texas in protecting its citizens from any unscrupulous dealings in real estate.

Judgment will be granted to Plaintiffs.

W. M. TAYLOR

UNITED STATES
DISTRICT JUDGE

September 29, 1982

APPENDIX C

UNITED HOME RENTALS, INC.,
MICHAEL A. LIVINGSTON and
W. EUGENE BUSHMAN,
Plaintiffs-Appellees

versus

TEXAS REAL ESTATE COMMISSION
and THE STATE OF TEXAS
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Texas

Before GEE, GARZA and TATE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed and that this cause be and the same is hereby remanded to the said District Court for proceedings consistent with this opinion;

IT IS FURTHER ORDERED that plaintiffs-appellees pay to defendants-appellants, the costs on appeal to be taxed by the Clerk of this Court.

OCTOBER 3, 1983

APPENDIX D

UNITED HOME RENTALS, INC.,
MICHAEL A. LIVINGSTON and
W. EUGENE BUSHMAN,
Plaintiffs-Appellees,

versus

TEXAS REAL ESTATE COMMISSION
and THE STATE OF TEXAS,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Texas

ON SUGGESTION FOR REHEARING EN BANC
(Opinion 10/3/83, 5 Cir., 198 , F.2d)
(October 31, 1983)

Before GEE, GARZA and TATE, Circuit Judges.

PER CURIAM:

(✓) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal

Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

THOMAS GILBERT, JR.
UNITED STATES CIRCUIT JUDGE

TATE, Circuit Judge, dissenting.

APPENDIX E

TEXAS' REAL ESTATE LICENSE ACT, TEX. REV. CIV. STAT. ANN. art. 6573a, § 2(2) (Vernon Supp. 1982), provides in revelant part:

> "Real estate broker" means a person who, for another person and for a fee, commission, or other valuable consideration, or with the intention or in the expectation or on the promise of receiving or collecting a fee, commission, or other valuable consideration from another person:
>
> . . . .
>
> (D) lists or offers or attempts or agrees to list real estate for sale, rental, lease, exchange, or trade;
>
> [or]
>
> (H) aids, attempts, or offers to aid in locating or obtaining for purchase, rent, or lease any real estate;
>
> . . . .

Texas Real Estate Commission Rule 402.03.02:

> .003.4 Real estate broker licensure is required for the operation of a rental agency. This section does not prohibit employment of an answering service which is identified to callers as such and which provides information concerning the size, price and terms of property advertised.
>
> .005.1 Locating and bringing together a buyer and seller through correspondence or telephone constitutes negotiation if done from within the borders of Texas.
>
> .005.5 Real estate licensure is required of rental agents doing all solicitation by telephone unless such agents are employees of the owner of the property concerned.
>
> .005.6 A clerical employee of a real estate broker is not required to be licensed if such employee engages in no

solicitation work and does not hold himself or herself out as authorized to act as a real estate agent.

.005.7 Answering of the telephone and acts of a secretarial nature done in a broker's office do not require real estate licensure.

.010.1 (a) Real estate licensure is required for the operation of an apartment selector/locator service or home-finding service in Texas.

.010.2 (b) the compilation and sale of listings of rental vacancies available in an area is activity requiring real estate licensure. This is true even if the property is not shown, sold, leased or managed.

.011.1 This section prohibits a person not listed as a Texas real estate broker or salesman from receiving a referral fee from another concerning the sale, exchange, purchase, rental or lease of real estate.

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.011.3 The referral of a prospective purchaser, for compensation, is an act requiring real estate licensure.

.013.1 Real estate licensure is required of those who advertise for others regarding real property, accept calls received in response to such advertisements, and refer the callers to the owner of the property.

Office - Supreme Court, U.S.
FILED
MAR 12 1984
ALEXANDER L. STEVAS

NO. 83-1361

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

* * *

UNITED HOME RENTALS,
MICHAEL LIVINGSTON,
W. EUGENE BUSHMAN,

Petitioners,

V.

THE STATE OF TEXAS,
THE TEXAS REAL ESTATE COMMISSION,

Respondents.

* * *

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

* * *

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

* * *

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QUESTIONS PRESENTED

1. Whether this action by United Home Rentals is barred by the doctrine of sovereign immunity in the Eleventh Amendment to the United States Constitution.

2. Whether this action by United Home Rentals should be dismissed by the federal courts due to the doctrine of *Pullman* abstention.

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NO. 83-1361

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

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UNITED HOME RENTALS,
MICHAEL LIVINGSTON,
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Petitioners,

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THE STATE OF TEXAS,
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Respondents.

• • •

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

• • •

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

• • •

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

NOW COME the State of Texas and the Texas Real Estate Commission, and file their Opposition to Petition for Writ of Certiorari in response to the Petition for Writ of Certiorari filed by Petitioner United Home Rentals.

OPINION BELOW

The district court opinion is found at 548 F.Supp. 566 (N.D. Tex. 1982). The opinion of the Court of Appeals reversing the decision of the district court is reported at 716 F.2d 324 (5th Cir. 1983).

STATEMENT OF THE CASE

After a district court decision that the Texas Real Estate License Act did not violate the Due Process and Equal Protection clauses of the Fifth and Fourteenth Amendments of the United States Constitution as applied to the business operations of United Home Rentals (hereinafter referred to as UHR), Petitioners filed a second action seeking to enjoin the Texas Real Estate Commission from enforcing the Act against UHR as violative of its First Amendment right to free commercial speech. The Commission asserted that UHR's activities made it a "broker" as defined in the Texas Real Estate License Act, so that UHR employees could not lawfully engage in those activities without a real estate license. TEX.REV.CIV.STAT. ANN. art. 6573a, §2(2). The licensure requirement enforced by the Commission seeks to regulate the acts of UHR, not its speech. These acts did include a speech element, but essentially the UHR employees performed acts in soliciting, verifying, and selling lists of rental vacancies which aid in bringing together potential tenants and landlords "for the purpose of effecting the ..., lease, or rental of real estate." TEX.REV.CIV.STAT.ANN. art. 6573a, §§ 2(2)(I), 2(2)(J).

Based on its understanding of the licensure requirements and its knowledge of UHR's business activities, the Commission determined that UHR employees should be licensed. It disapproved the licenses because applicants signed under oath a statement that they had not been performing regulated acts without a license, when in fact they had been. (Opinion below, 548 F.Supp. 566, 568-569 (N.D.Tex. 1982)). The applicants' careless disregard for the oath to which they swore caused the Commission concern about their honesty and trustworthiness. TEX.REV.CIV.STAT. ANN. art. 6573a, §6(b). It must be kept in mind that these individuals were engaging in a business known for its history of misrepresenting and deceiving the Texas consumer. (Opinion below, 548 F.Supp. 566, 569 (N.D. Tex. 1982)).

On September 29, 1982 the district court found that the Real Estate License Act as applied to UHR violated the First Amendment right to free commercial speech, even though the intent of the statute is to regulate conduct, not speech. On October 3, 1983 the Fifth Circuit Court of Appeals reversed the decision and ordered the cause dismissed without prejudice based on the principle of abstention.

SUMMARY OF THE ARGUMENT

The Court of Appeals properly held that the principles of abstention as described in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), require a federal court to dismiss this cause. The doctrine of sovereign immunity of the Eleventh Amendment of the United States Constitution also bars this action.

ARGUMENT

I.
THIS ACTION BY UNITED HOME RENTALS IS ABSOLUTELY BARRED BY THE DOCTRINE OF SOVEREIGN IMMUNITY FOUND IN THE ELEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

After the case of *Chisholm v. Georgia*, 2 Dall. 419 (1793), the Eleventh Amendment was added to the United States Constitution to prohibit suits in federal court against a state by citizens of another state. U. S. CONST. amend. XI. This amendment was interpreted in *Hans v. Louisiana*, 134 U.S. 1 (1890), to bar federal court suits against a state by one of its own citizens. (See also *Employees v. Missouri Public Health Dept.*, 411 U.S. 279, 280 (1973))

This limitation on federal jurisdiction can be raised at any point in the proceeding "... even though urged for the first time in this Court." *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 467 (1945). This is because "the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given: ..." *Ex parte State of New York, No. 1*, 256 U.S. 490, 497 (1921).

In the absence of state consent, the Eleventh Amendment bars a suit in federal court against a state or one of its agencies. *Florida Dept. of Health v. Florida Nursing Home Assn.*, 450 U.S. 147 (1981) (*per curiam*). Even a suit against state officials is barred when "... the state is the real, substantial party in interest," *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464 (1945), or "... if the decree would operate against the latter (state)," *Hawaii v. Gordon*, 373 U.S. 57, 58 (1963) (*per curiam*), or would "... restrain the Government from acting, or ... compel it to act." *Dugan v. Rank*, 372 U.S. 609, 620 (1963), quoting *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 704 (1949).

An exception was created in *Ex Parte Young*, 209 U.S. 123 (1908), allowing suit in federal court against a state official for unconstitutional action. In such a case Plaintiffs may obtain prospective injunctive relief, but not retroactive monetary relief. *Edelman v. Jordan*, 415 U.S. 651 (1974). Even an injunction may be subject to the Eleventh Amendment bar. *Cory v. White*, 457 U.S. 85, 91 (1982). Where relief is sought effectively against a state, the Eleventh Amendment bars an injunction against errors of law by state officials acting in their official capacities. *Pennhurst State School and Hospital v. Halderman*, 52 U.S.L.W. 4155, 4161 (U.S. January 23, 1984), citing *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 695 (1949).

The present action is clearly a suit against the state. The only defendants are the State of Texas and an agency of the State of Texas, the Texas Real Estate Commission. UHR did not name any public officials as defendants. Thus, the *Ex Parte Young* fiction cannot apply.

The State of Texas has not consented to this lawsuit in any fashion. It is not only the "real, substantial party in interest," it is the only party defendant to this action. Any decision favorable to UHR would operate against the State, restraining it from enforcing the Texas Real Estate License Act.

The §1983 flavor of this suit does not overcome the Eleventh Amendment bar. A suit under 42 U.S.C. §1983 cannot avoid the Eleventh Amendment. *Quern v. Jordan*, 440 U.S. 332, 342

(1979). A federal court is barred by the Eleventh Amendment "from granting any relief" in such a suit "brought directly against a State, ...". *Pennhurst*, 52 U.S.L.W. at 4163 and n. 30; see also *Alabama v. Pugh*, 438 U.S. 781 (1978) (*per curiam*). Whether these Plaintiffs "foolishly attempt(ed) to sue the State in its own name, ...", *Pennhurst*, at 4162, this suit must be barred by the doctrine of sovereign immunity in the Eleventh Amendment. As noted in the *Pennhurst* case concerning sovereign immunity of the state, the abstention doctrine causes unclear issues of state law to be "split off and referred to the state courts." *Id.*, at 4164.

II.

THE PULLMAN DOCTRINE OF ABSTENTION REQUIRES THIS CAUSE OF UNITED HOME RENTALS TO BE DISMISSED BY THE FEDERAL COURTS.

In *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), the Court determined that the federal courts should abstain from deciding cases requiring them to interpret unclear state laws not yet construed by the state courts. Federal court decisions in such cases are nothing more than "a forecast rather than a determination" of state law, and "a tentative answer which may be displaced tomorrow by a state adjudication". *Id.*, at 499-500. The Court found that such "an unnecessary ruling of a federal court" created "needless friction with state policies, ...". *Id.*, at 500. The Court has decided that the *Pullman* principle of abstention should be applied "(w)here resolution of the federal constitutional question is dependent upon, or may be materially altered by, the determination of an uncertain issue of state law, ... to avoid unnecessary friction in federal—state relations, interference with important state functions, tentative decisions on questions of state law, and premature constitutional adjudication." *Harman v. Forssenius*, 380 U.S. 528, 534 (1965); *Lake Carriers' Assn. v. MacMullan*, 406 U.S. 498, 511 (1972).

The abstention doctrine is "not an automatic rule," but "a discretionary exercise of a court's equity powers" to be applied only in "'special circumstances', ... on a case-by-case basis." *Baggett v. Bullitt*, 377 U.S. 360, 375 (1964). It is not an "ab-

dication of federal jurisdiction, but only the postponement of its exercise;..." *Harrison v. NAACP*, 360 U.S. 167, 177 (1959). It is "the exception, not the rule." *Colorado River Water Cons. Dist. v. U.S.*, 424 U.S. 800, 813 (1976).

Abstention is appropriate "(w)here strands of local law are woven into the case" and the federal right is "entangled in skein of state law", *McNeese v. Board of Education*, 373 U.S. 668, 673—74 (1963), or where the "nub of the whole controversy" involves "state law problems" that are "delicate ones," *Reetz v. Bozanich*, 397 U.S. 82, 85, 87 (1970), citing *City of Meridian v. Southern Bell T. & T. Co.*, 358 U.S. 639, 640-641 (1959) (*per curiam*), or where the case involves a "knotty state law question," *Wisconsin v. Constantineau*, 400 U.S. 433, 438 (1971). The Court has required abstention in those cases where the questions of law are "intensely local and immensely important to a wide spectrum of state government activities." *Elkins v. Moreno*, 435 U.S. 647, 662-663 n. 16 (1978). Where state laws are "fairly open to interpretation" the federal court should stay its hand until the state has an opportunity to consider the questions in order to serve the principle of comity in federal-state relations. *Harrison*, 360 U.S. at 176-77; see also *Fair Assessment in Real Estate Assn. v. McNary*, 454 U.S. 100, 115-116 (1981). Where the federal and state court issues are not the same, abstention is proper, particularly where there is a state remedy available. *Askew v. Hargrave*, 401 U.S. 476, 478 (1971) (*per curiam*). [1]

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1. While the Court of Appeals only applied *Pullman* abstention to this case, other types of abstention may also be appropriate. Abstention principles of *Younger v. Harris*, 401 U.S. 37 (1971), as expanded in *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975), and *Juidice v. Vail*, 430 U.S. 327 (1977), urge abstention in this case due to the pending state proceedings. While *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 480 n. 11 (1977), found that the state had submitted to the federal forum waiving the comity principle of abstention, the Court noted that the "wishes of the parties concerning adjudication" did not require court deference in *Pullman* abstention. While the abstention of *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), may have involved more complex local issues than present here, the principle applied is the same. Likewise, the "exceptional circumstances" described in *Colorado River Water Cons. Dist. v. U.S.*, 424 U.S. 800, 818 (1976), and *Moses H. Cone Mem. Hospital v. Mercury Construction Corp.*, 51 U.S.L.W. 4156 (U.S. February 23, 1983), and the "advantages" of abstention in *Board of Regents v. Tomanio*, 446 U.S. 478, 496 (1980) (Brennan, J., dissenting), to be realized from state adjudication first in sparing "the federal courts some unnecessary work" apply here.

The Court has abstained under *Pullman* where it found the state law to be unclear or difficult. *Harrison*, 360 U.S. at 176-177; *Reetz*, 397 U.S. at 85; *Lake Carriers'* 406 U.S. at 511; *Harris County Commissioners Court v. Moore*, 420 U.S. 77, 85 (1975). The Court has declined to abstain where the state law was clear as in *Harman*, 380 U.S. at 535, and *Examining Board v. Flores de Otero*, 426 U.S. 572, 597 (1976), or where the statute is unduly vague, *Baggett*, 377 U.S. at 378, or where the statute is overbroad and has been attacked as unconstitutional on its face, *Zwickler v. Koota*, 389 U.S. 241, 252 (1967); *Constantineau*, 400 U.S. at 439.

In cases where the state law determination could avoid the federal constitutional question, the Court has abstained. *Reetz*, 397 U.S. at 86-87; *Askew v. Hargrave*, 401 U.S. at 478; *Lake Carriers*, 406 U.S. at 512; *Harris County*, 420 U.S. at 85; *Bellotti v. Baird*, 428 U.S. 132, 148 (1976). In *Harman*, 380 U.S. at 536, *Zwickler*, 389 U.S. at 249-50, and *Kusper v. Pontikes*, 414 U.S. 51, 55 (1973), the Court found that the federal constitutional issue could not be avoided. The Court also declined to abstain in cases in which the state's highest court had already considered the matter. *Kusper*, 414 at 55; *Orr v. Orr*, 440 U.S. 268, 276-77 (1979).

The Court has also declined to abstain where a fundamental civil right is invovled. *McNeese*, 373 U.S. at 674 (Education); *Harman*, 380 U.S. at 537 and *Kusper*, 414 U.S. at 56-57 (voting); *Zwickler*, 389 U.S. at 252 (free expression). The Court is concerned with the delay caused by abstention and the resulting piecemeal adjudication. *England v. Medical Examiners*, 375 U.S. 411, 418 (1964); *Harman*, 380 U.S. at 537; *Baggett*, 377 U.S. at 378-79.

There are important similarities between *Pullman* and this case. Both cases involve disputes concerning administrative orders or decisions. Both involve state laws which are unclear. As in *Pullman*, the Texas Supreme Court has not adjudicated the question concerning the reach of a state statute.

Special circumstances call for abstention in this case. First, were this statute to be construed by Texas courts, it could be interpreted in a manner that would avoid the constitutional

issue. The issue is the validity of a state agency interpretation of state law. The entire controversy results from a dispute as to whether the activities of UHR employees require a real estate license. Texas courts could decide that the Texas Real Estate Commission's interpretation is erroneous, or that the statute does not reach as far as the Commission asserts, thereby avoiding the constitutional question. See *Harrison*, 360 U.S. at 177-178; *Babbitt v. Farm Workers*, 442 U.S. 289, 307-312 (1979). Moreover, Plaintiff argues that the state law is "unconstitutional as applied" to the business of UHR, an argument properly suited for the application of abstention. *Harris County*, 420 U.S. at 86 n. 9; *Baggett*, 377 U.S. at 376-77.

Second, a decision now will have an important impact on the state. While the Court of Appeals may not have described the important state interest to the satisfaction of UHR, that interest exists. The Real Estate License Act was designed to protect the unsuspecting Texas public from the unscrupulous in the real estate business. *Henry S. Miller Co. v. Treo Enterprises*, 585 S.W.2d 674, 675-76 (Tex. 1979). If the federal court decision erroneously construes this state law and finds it unconstitutional as applied to businesses such as UHR, the state will be stripped of legislation protecting Texas consumers from the unscrupulous. See Field, *Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine*, 122 U. Pa. L. Rev. 1071, 1078 (1974); *Younger v. Harris*, 401 U.S. at 51. The whole question revolves around "knotty" state law problems, fairly open to interpretation, the "nub" of which involve "intensely local and immensely important" matters of concern. Unlike *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 481 (1977), the benefits of abstention here are not "too speculative," and may "avoid the possibility of unnecessarily deciding a constitutional question." *Harris County*, 420 U.S. at 83. Also, the federal issue here is not necessarily the same issue which the state courts would consider. First Amendment protection of free commercial speech is at issue here. Before the state courts, the primary issue would be the the reach of the state law; i.e., does it even apply to these employees.

Since the federal issue is dependent upon the unclear and unresolved state law, abstention should apply to avoid needless

friction in federal—state relations and interference with the important state function of protecting the Texas public from dishonesty and fraud. Any federal decision now would be a premature and tentative constitutional adjudication, truly a forecast of local law "not binding on state courts and (which) may be discredited at any time ..." *Moore v. Sims*, 442 U.S. 415, 428 (1979).

Further, the Supreme Court itself has described the *Pullman* abstention doctrine without mentioning the importance of the state's interest. (See *Id.*, at 427-28; and *Harris County*, 420 U.S. at 83-84). As the Court said in *Moore v. Sims*, 442 U.S. at 429-430:

> (s)tate courts are the principal expositors of state law. Almost every constitutional challenge ... offers the opportunity for narrowing constructions that might obviate the constitutional problem and intelligently mediate federal constitutional concerns and state interests. When federal courts disrupt that process of mediation while interjecting themselves in such disputes, they prevent the informed evolution of state policy by state tribunals. ... The price exacted in terms of comity would only be outweighed if state courts were not competent to adjudicate federal constitutional claims—a postulate we have repeatedly and emphatically rejected. (Citations omitted)

(For a discussion of access to federal courts for adjudication of constitutionality of state laws in state tax context, please see *McNary*, 454 U.S. 100, holding comity outweighs §1983 considerations and requires abstention)

Third, unlike *McNeese*, *Harman*, and *Kusper*, a fundamental civil right does not exist here. The First Amendment assertion relates to a peripheral constitutional right deserving only of limited constitutional protection. *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 456 (1978). Where the state law is unclear, balancing its consumer protection aspect against a peripheral commercial right should weigh in favor of protecting the public at least until the state courts have considered the matter; and particularly where, as here, no constitutional

infringement exists in the interim. (Opinion below, 716 F.2d at 333-334, n. 28).

Fourth, the delay caused by the piecemeal adjudication of cases required by abstention is not a factor here. [2] Since the Commission issued licenses to the subject employees of UHR based on the injunction granted by the district court, the delay occasioned by abstention should not create any undue hardship affecting its business operation. Since UHR admits that no licensees other than Livingston are now employed by it, (UHR Brief, p. 2), what UHR wants is a favorable decision on the merits which can be applied to the "new unlicensed" employees. These new employees are not part of this case. The applicability of this state law to these "new unlicensed" employees should be reserved for another day.

The State of Texas and the Texas Real Estate Commission do not object to the application of the *Pullman* abstention doctrine in this case. Admittedly, Texas and the Commission entered into stipulations in the district court waiving the abstention application. It seems clear, however, that the principles of *Pullman* abstention cannot be waived and may be considered by the Court *sua sponte*. *Bellotti v. Baird*, 428 U.S. at 143-144, n. 10. Indeed, *Pullman* abstention "surely does not require that this Court defer to the wishes of the parties concerning adjudication." *Hodory*, 431 U.S. at 480 n. 11. Although the Court in one case declined an invitation to consider abstention when first raised at oral argument, it hinted that if abstention had been raised in the court of appeals, abstention would be considered in the Supreme Court. *Vance v. Universal Amusement Co.*, 445 U.S. 308, 315 n. 11 (1980). Even the *Pullman*

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2. Actually greater delay would be occasioned if the position of UHR is upheld. Since the licenses in question were issued, no constitutional deprivation occurs if this action ends now as ordered by the Court of Appeals. If the Court of Appeals decision is reversed, however, the case supposedly will be remanded to that court for a decision on the merits, with or without further argument, and subsequent appeal possibly again to this Court on the merits. One of the major arguments against abstention—undue delay—should not be used to defeat its application and cause the very delay the denial of abstention is designed to avoid. Such an occurrence would be incongruent and nothing more than an academic exercise in light of the issuance of the licenses.

case itself involved the application of abstention principles by the Supreme Court.

This Texas law protects the Texas citizen by authorizing the State to close down the unscrupulous operators who are not licensed, and by cancelling the licenses of the unscrupulous who are licensed by the state. If a State waiver bars the application of abstention and the federal courts unnecessarily and erroneously construe this state law, the Texas public will be denied its protection. Under Texas law, the Attorney General cannot prejudice the rights of the State by any waiver. TEX.REV.CIV.STAT.ANN. art. 4411. (See Appendix) The application of abstention should be considered on its merits, and not avoided due to procedural technicalities occurring earlier in this lawsuit. The people of Texas certainly deserve more.

UHR argues that there is conflict between the Fifth Circuit and other courts of appeals concerning the application of the *Pullman* abstention principle and the question of *de novo* review at the appellate level. Yet, the Fifth Circuit clearly found an undecided and ambiguous issue of state law in this case that could be resolved without reaching the federal constitutional issue. (Opinion below, 716 F.2d at 332, 333). It also considered the delay inherent in abstention in reaching its decision. (Opinion below, 716 F.2d at 334). In applying these principals, it followed the *Pullman* abstention principles as outlined by the Supreme Court in case after case since *Pullman* itself. The Fifth Circuit applies the *Pullman* abstention principles enunciated by the Supreme Court, as all the courts apply them. There is no conflict between the *Pullman* doctrine as applied by the Fifth Circuit and that applied by other courts of appeals. Even the court of appeals in *D'Iorio v. County of Delaware*, 592 F.2d 681, 686 (3rd Cir. 1978), agrees that *Pullman* abstention can be raised *de novo* in the court of appeals.

Finally, contrary to UHR's assertion, this case does not involve the "wolf" of exhaustion of remedies in the "sheep's clothing" of abstention. The application of abstention principles

to a cause based on 42 U.S.C. §1983 is not novel. [3] UHR would deny power to the federal courts ever to abstain when the red flag of §1983 is unfurled. Over forty years of abstention decisions by this Court should not be so easily dismissed. Even *Patsy v. Florida Board of Regents*, 457 U.S. 496, 518-519 (1982), (White, J., concurring in part), notes the distinction between abstention and exhaustion. Exhaustion and abstention are distinct doctrines, neither masquerading as the other, yet both protecting important interests in judicial economy and federal—state relations. This case invokes abstention to protect these interests. Quite simply, exhaustion and abstention should no more be blended together than two wines of distinct bouquets be mingled in the same cask.

CONCLUSION

The decision of the Court of Appeals to reverse the district court and order dismissal of this cause without prejudice should be upheld. The doctrine of *Pullman* abstention requires that Texas courts first be given the opportunity to consider the difficult questions of state law before the federal courts determine if a federal constitutional issue remains to be reviewed. More importantly, since the state has not consented to suit, this action against Texas should be barred by the doctrine of sovereign immunity codified in the Eleventh Amendment of the United States Constitution.

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3. In the following §1983 cases abstention of some variety was deemed proper: *Douglas v. City of Jeannette*, 319 U.S. 157 (1943); *Harrison*, 360 U.S. at 169; *Bellotti*, 428 U.S. at 136; *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975); *Juidice v. Vail*, 430 U.S. 327 (1977); *Trainor v. Hernandez*, 431 U.S. 434, 444-445, n. 8 (1977); and *McNary*, 454 U.S. 100 (1983). In *Middlesex County Ethics Committee v. Garden State Bar Assoc.*, 457 U.S. 423 (1982), a case quite similar to this one, the Court abstained under *Younger* abstention.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies each of the foregoing instrument has been sent via U.S. Mail, certified, return receipt requested on this the 9TH day of MARCH, 1984 to Mr. Steve Brutsché, JONES & BRUTSCHÉ, 3000 Turtle Creek Plaza, Suite 116, Dallas, Texas 75219, Mr. John E. Kennedy, 3315 Daniel, Dallas, Texas 75275, and Mr. H. Bartow Farr III, ONEK, KLEIN & FARR, 2550 M. St. N.W., Washington, D.C. 20037.

George Warner

GEORGE WARNER
Assistant Attorney General

APPENDIX

APPENDIX

ARTICLE 4411

No admission, agreement or waiver, made by the Attorney General, in any action or suit in which the State is a party, shall prejudice the rights of the State.

Acts 1846, p. 206; P.D. 211; G.L. vol. 2, p. 1148.

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No. 83-1361

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

UNITED HOME RENTALS, INC., *et al.*,
Petitioners,

v.

TEXAS REAL ESTATE COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR PETITIONERS

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STATUTES AND RULES:

The Eleventh Amendment of The United States Constitution ..... *passim*

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REPLY BRIEF FOR PETITIONERS

Respondents' brief in opposition to the petition for certiorari adds little to the reasoning of the court of appeals on the abstention issue, but raises for the first time a spurious Eleventh Amendment defense. Petitioners submit this short reply to address the latter issue as well as a few remaining aspects of the abstention question.

I. *The Eleventh Amendment*

Respondents' first contention is that they, as a State and a state commission, are protected from suit by the Eleventh Amendment. This argument simply cannot be squared with the way in which this case was presented to the district court. Any Eleventh Amendment immunity that respondents could have asserted became irrelevant when they joined with petitioners in a motion affirmatively asking the district court to decide the merits based

on a set of stipulated facts. *See* Joint Motion of the Plaintiffs and Defendants for the Court to Rule on the Merits and Not Abstain, in the Appendix to this brief. At that point, respondents "became . . . actor(s) as well as defendant(s)," *Clark v. Barnard*, 108 U.S. 436, 448 (1883), and gave up any right to challenge the resulting court decision under the Eleventh Amendment.

It is well established that "where a state voluntarily becomes a party to a cause, and submits its rights for judicial determination, it will be bound thereby, and cannot escape the result of its own voluntary act by invoking the provisions of the 11th Amendment." *Gunter v. Atlantic Coast Line Railroad Co.*, 200 U.S. 273, 284 (1906). This principle applies even where the state or state agency is technically the "defendant," but has taken affirmative steps to seek an adjudication of its rights in federal court. Thus, efforts to invoke the Eleventh Amendment have been rejected where state defendants had previously sought and won removal of the case to federal court,[1] had filed a counterclaim of their own,[2] had filed a claim to a fund in bankruptcy,[3] or had agreed to a consent decree only later to resist its implementation.[4]

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[1] *Newfield House, Inc. v. Massachusetts Dept. of Public Welfare*, 651 F.2d 32, 36 n.3 (1st Cir.), *cert. denied*, 454 U.S. 1114 (1981); *Gallagher v. Continental Ins. Co.*, 502 F.2d 827, 830 (10th Cir. 1974).

[2] *See Mohegan Tribe v. State of Connecticut*, 528 F. Supp. 1359, 1367 (D. Conn. 1982); *Aldens, Inc. v. Ryan*, 454 F. Supp. 465, 470 (W.D. Okla. 1976), *aff'd on other grounds*, 571 F.2d 1159 (10th Cir. 1978) (alternative holding).

[3] *Clark v. Barnard*, 108 U.S. 436, 448 (1883); *In re Crisp*, 521 F.2d 172, 178 (2d Cir. 1975) (alternative holding). *See also Cobb Coin Co. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 549 F. Supp. 540, 555 (S.D. Fla. 1982) (filing claim to wreck in admiralty *in rem* suit).

[4] *New York State Ass'n for Retarded Children v. Carey*, 596 F.2d 27, 39 (2d Cir.), *cert. denied*, 444 U.S. 836 (1979) (alternative holding); *Jordan v. Fusari*, 496 F.2d 646, 651 (2d Cir. 1974).

In light of these precedents, respondents clearly are in no position to assert the Eleventh Amendment here. Their decision to resist any transfer of the case to state court and seek a merits ruling based on stipulated facts represented an affirmative invocation of the power of the district court. We see no constitutional distinction between that behavior and the decision to seek removal to federal court,[5] or, indeed, an effort to secure a declaratory judgment. As the court put it in *Aldens, Inc. v. Ryan*, 454 F. Supp. 465, 470 n.3 (W.D. Okla. 1976), *aff'd on other grounds*, 571 F.2d 1159 (10th Cir. 1978), a case where a state defendant had counterclaimed and submitted the case for decision on stipulated facts, such conduct simply is "inconsistent with the assertion of Eleventh Amendment immunity."[6] At the same time, because they would create a "no lose" situation for state defendants,[7] such tactics "would if allowed work a virtual fraud on the federal court and opposing litigants." *Newfield House, Inc. v. Massachusetts Department of Public Welfare*, 651 F.2d 32, 36 n.3 (1st Cir.), *cert. denied*, 454 U.S. 1114 (1981).

In light of the state's affirmative decision to seek a judgment from the federal court, this case does not involve "the indignity of subjecting a State to the coercive process of judicial tribunals * * *." *Ex Parte Ayers*, 123 U.S. 442, 505 (1887). Nor, by its unfettered choice to invoke federal jurisdiction, has the State surrendered any real protection against a decision on the merits. Because petitioners have sought only injunctive relief on federal

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[5] See note 1, *supra*.

[6] *See also Department of Education v. Katherine D.*, 531 F. Supp. 517, 529 (D. Hawaii 1982) (Eleventh Amendment claim barred where state chose to appeal administrative ruling to federal rather than state court).

[7] Such defendants could submit the case to the federal court, knowing that any unfavorable decision would be voidable under the Eleventh Amendment.

constitutional grounds, a decision to raise an Eleventh Amendment defense, instead of submitting the case for decision, would have led only to a substitution of individual state defendants and the same prohibition against denying petitioners their constitutional rights.[8] There is thus no state interest present here that would justify second-guessing the Attorney General's decision to disregard this issue and instead affirmatively seek a ruling in the name of the existing defendants. Having made that choice, respondents have no right to challenge the power of the court to issue the very ruling that they themselves requested.

II. *Abstention*

Respondents' discussion of *Pullman* abstention is equally unpersuasive. Although they do not dispute that many courts of appeals, unlike the Fifth Circuit, require identification of an important state interest to be served by such abstention, they nonetheless appear to suggest that this factor is irrelevant in *Pullman* abstention cases.[9]

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[8] Indeed, if there were a live Eleventh Amendment claim in this case, this Court itself could make this technical change in the named defendants, while proceeding with the merits of the petition for certiorari. *Mullaney v. Anderson*, 342 U.S. 415, 417 (1952). This change would cause no prejudice whatever to the State. On the other hand, "[t]o dismiss the present petition and require the new plaintiffs to start over in the District Court would entail needless waste." *Id.*

[9] Respondents cite *Harris County Commissioners Court v. Moore*, 420 U.S. 77, 83-84 (1975), and *Moore v. Sims*, 442 U.S. 415, 427-28 (1979), for this proposition. Yet in *Harris* the Court cautioned that abstention should be invoked only in "special circumstances," such as where the issues are "matters peculiarly within the province of the local courts." 420 U.S. at 83-84. Similarly, *Moore v. Sims*, recognized that in *Pullman*, "the Court observed that the dispute before it implicated 'a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open.'" 442 U.S. at 427.

We note, in this regard, that *Moore v. Sims* was a case applying the abstention doctrine of *Younger v. Harris*, 401 U.S. 37 (1971),

Resp. Opp. at 9. As we have noted in our petition, such confusion about the scope of the *Pullman* doctrine is precisely why review by this Court is appropriate. Pet. 9-14. Perhaps recognizing the awkwardness of their position, respondents also engage in inventive suppositions about the state interests that the court of appeals *could* have considered had it chosen to do so. Even if this were an adequate way to support the decision below, it would fail here because the "state interests" proposed by respondents make little sense.

Respondents first suggest that the State has an interest in having its statute construed by a state court. Resp. Opp. at 7-8. While we do not dispute that this interest should be given some weight, the effort to make it controlling would simply erase this factor as a separate criterion in *Pullman* cases. By definition, this factor is present whenever an abstention question is created by a federal-court challenge to a state statute. Yet the Ninth Circuit, in its three-part test, requires the presence of a "sensitive area of social policy" quite apart from a doubtful, and possibly determinative, issue of state law. See Pet. 10-11; *C-Y Development Co. v. City of Redlands*, 703 F.2d 375, 377 (9th Cir. 1983).

Second, respondents suggest that abstention served a state interest because the district court's constitutional holding left the State "stripped of legislation protecting Texas consumers from the unscrupulous." Resp. Opp. at 8. That argument simply misses the point. The whole purpose of abstention, as envisioned by the Fifth Circuit, would be to allow the state courts an opportunity to *narrow* the state law to exclude the category of persons represented by petitioners. If that opportunity was utilized

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which involved federal court interference with *ongoing* state proceedings. The passage from *Moore* quoted in Respondents' brief at 9 must be read in light of the greater intrusion on state sovereignty inherent in any federal constitutional ruling that interferes with ongoing state adjudication.

by a state court, the scope of state law would then be no broader, and possibly narrower, than under the terms of the district court's constitutional ruling. Any benefit to consumers from abstention, therefore, could only result from the delays entailed in seeking a state court interpretation, *i.e.*, from the possibility that respondents will be able, in the interim, to continue to apply a law held by the district court to be unconstitutional.

The plain fact is that no particular state interest would be served by abstention here, as the State itself recognized in the joint motion informing the district court that "state law is clear [and] *Pullman* type abstention is not required." *See* Appendix. Even if this motion by the parties did not technically bind the district court, it is certainly indicative of the dubious validity of state interests asserted in this Court now that, after losing on the merits, respondents have decided that they no longer "object" to *Pullman* abstention.[10] Resp. Opp. at 10.

Respondents are no more convincing in their suggestion that the delays created by abstention would cause no "undue hardship" to petitioners. Resp. Opp. at 10. This argument seems to be premised on the fact that the unlicensed employees originally employed by petitioner United Home Rentals now have licenses. While this may be true, it is equally clear that unlicensed persons are currently working for United Home Rentals. *Id.* Their right to do so remains a central issue in the case. Obviously, petitioners retain a strong interest in obtaining a favorable ruling as quickly as possible.

Finally, respondents betray only confusion in their attempt to dismiss the second issue raised in the petition—

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[10] In another portion of the joint motion, the parties stated that "[t]here are no unsettled questions of State law involved in this case." *See* Appendix. Yet they now contend that the "federal issue is dependent upon the unclear and unresolved state law." Resp. Opp. at 8.

the proper standard for review of an abstention ruling in the court of appeals. Although they say that they support the Fifth Circuit's *"de novo"* review standard, they appear to be referring instead to the undisputed power of a court of appeals to raise the issue of abstention *sua sponte*. Resp. Opp. at 11. In any event, it remains clear that the *de novo* standard applied here conflicts with the well-established rule in a number of other circuits. *See* Pet. at 15-17. The proper standard to be applied remains an issue worthy of consideration by this Court.

CONCLUSION

The decision below raises serious issues that the circuits have failed to resolve uniformly. This Court should grant a writ of certiorari to resolve them.

Respectfully submitted,

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March 23, 1984

APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. CA-3-81-0809-C

UNITED HOME RENTALS, INC.,
MICHAEL A. LIVINGSTON, AND W. EUGENE BUSHMAN,
Plaintiffs,

vs.

TEXAS REAL ESTATE COMMISSION,
AND THE STATE OF TEXAS,
Defendants.

[Filed Jul. 8, 1982]

JOINT MOTION OF THE PLAINTIFFS AND DEFENDANTS FOR THE COURT TO RULE ON THE MERITS AND NOT ABSTAIN

TO THE HONORABLE JUDGE OF SAID COURT:

COME Plaintiffs, United Home Rentals, Michael Livingston and W. Eugene Bushman, and Defendants, Texas Real Estate Commission and The State of Texas, and move the Court to rule on the merits and render Judgment thereon and not to abstain therefrom, and in support thereof would show the Court as follows:

1. There are no unsettled questions of State law involved in this case with regard to the coverage of the Real Estate Licensing Act to the activities of Plaintiffs and their agents and employees.

2. The State has acted to revoke the licenses of Plaintiffs' employees and agents and has refused to grant li-

censes of Plaintiffs' agents. These actions are final unless contested by Plaintiffs and/or their agents, therefore there is a case or controversy between the parties.

3. Plaintiffs are not required to exhaust their administrative remedies and have standing to assert the constitutional rights applicable to their employees in this matter.

4. To the degree necessary, Defendants waive any right they may have to seek abstention by the Court on any basis.

5. This motion is based upon the Stipulations contained in the PreTrial Order, orally made by the parties in their opening statements, and by the additional stipulations filed herein. To the degree abstention is applicable, it is waivable, both by the express action of the Defendants in not asserting it and by their affirmative conduct in this case. *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 329, 84 S.Ct. 1293, 1296 (1964).

6. In that State law is clear, *Pullman* type abstention is not required. See *Wright and Miller*, Section 4242, pages 455-458 and cases cited thereunder.

7. The requirement of exhaustion of administrative remedies is an extension of "*Younger v. Harris*" type abstention which is waivable. See *Wright Miller*, Section 4245, pages 547, 548.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs and Defendants pray that this Honorable Court adjudicate the above numbered and entitled cause on the merits and not abstain.

Respectfully submitted,

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